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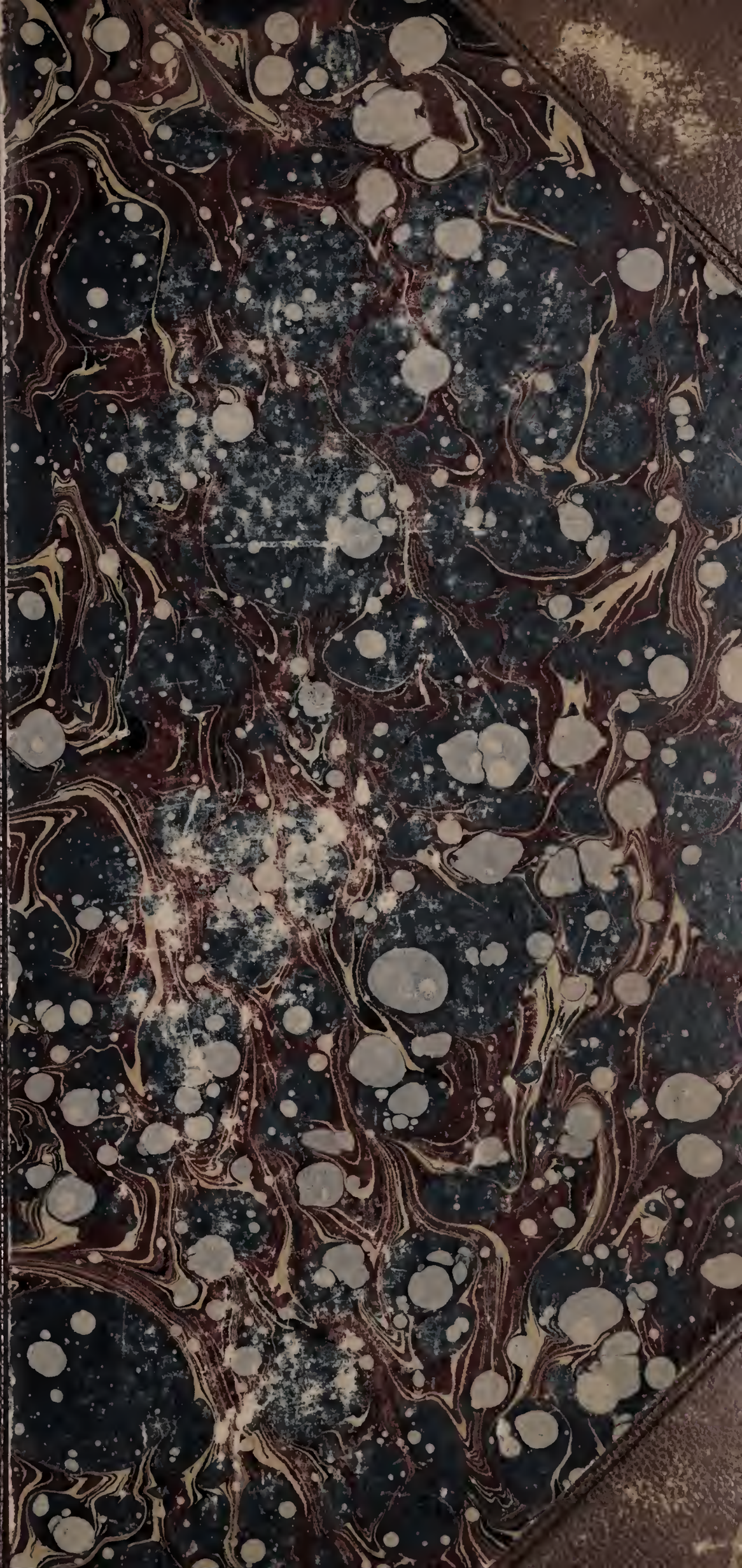

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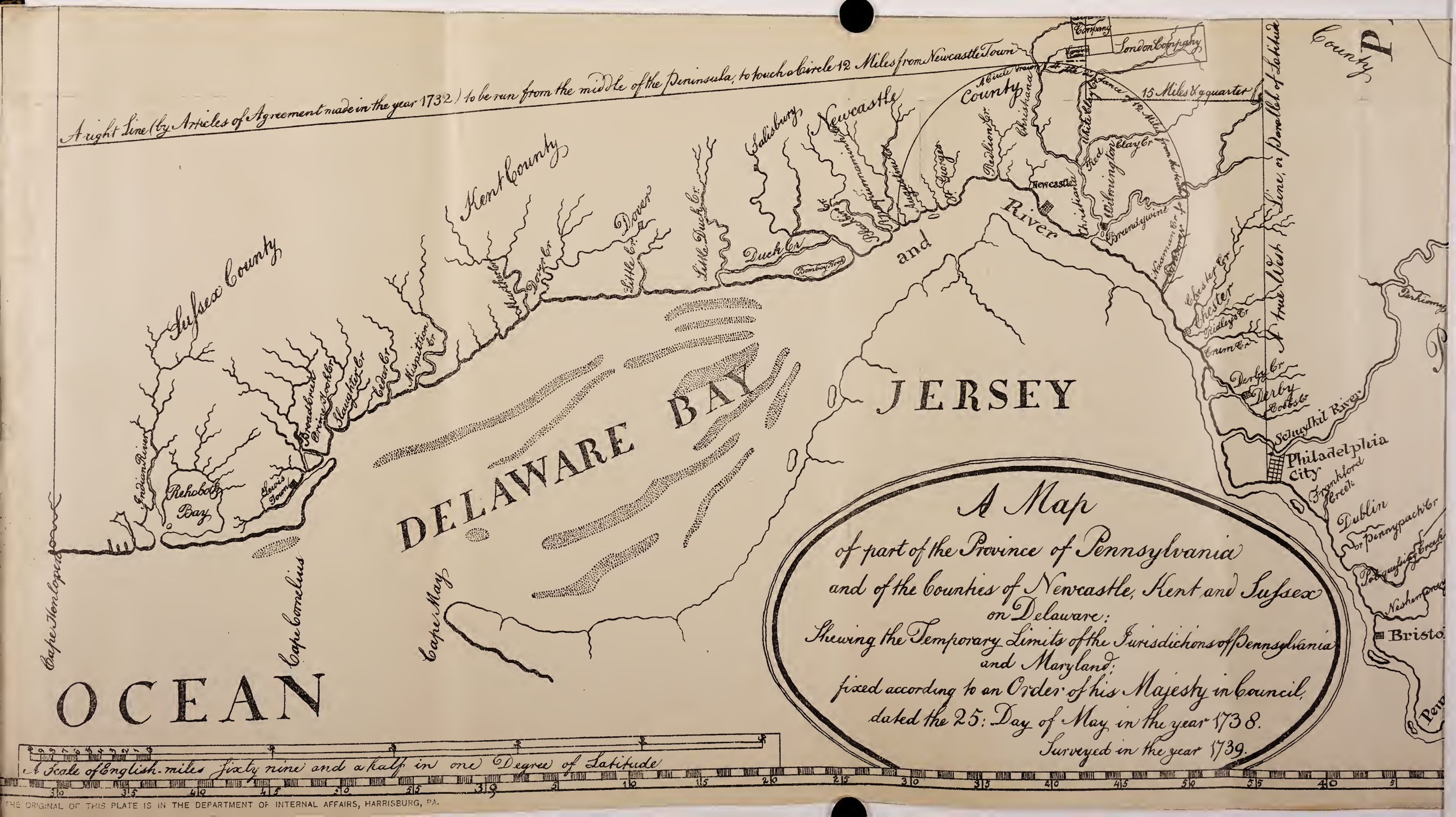
A right Line (by Articles of Agreement made in the year 1732) to be run from the middle of the Peninsula, to touch a Circle 12 Miles from Newcastle Town
A Map
of part of the Province of Pennsylvania
and of the Counties of Newcastle, Kent and Sussex
on Delaware:
Shewing the Temporary Limits of the Jurisdictions of Pennsylvania
and Maryland:
fixed according to an Order of his Majesty in Council,
dated the 25: Day of May in the year 1738.
Surveyed in the year 1739.
DELAWARE BAY
OCEAN
JERSEY
and
River
Sussex County
Kent County
Newcastle
Dover
Philadelphia City
Chester
Derby
Schuylkil River
Cape Henlopen
Cape Cornelius
Cape May
Rehoboth Bay
Lewis Town
A Scale of English miles sixty nine and a half in one Degree of Latitude

THE ORIGINAL OF THIS PLATE IS IN THE DEPARTMENT OF INTERNAL AFFAIRS, HARRISBURG, PA.

MARYLAND.
RAILROADS.
NORTHWESTERN PART
3 Annapolis, Washington & Baltimore. Adams Exp.
7 Bachman Valley. Adams Exp.
9 Baltimore & Ohio. Short Line. U. S. Exp.
13 Baltimore, Chesapeake & Atlantic. Adams Exp.
18 Baltimore & Ohio. U. S. Exp.
22 Chesapeake & Ohio. Adams Exp.
25 Cumberland & Pennsylvania. U. S. Exp.
26 Cumberland Valley. Adams Exp.
32 Emmitsburg. Adams Exp.
35 George's Creek & Cumberland. Adams Exp.
39 Maryland, Delaware & Virginia. Adams Exp.
41 Maryland & Pennsylvania. Adams Exp.
44 Monocacy Valley.
45 New York, Philadelphia & Norfolk. Adams Exp.
46 Northern Central. Southern Exp.
47 Northern Central. Adams Exp.
49 Pennsylvania. Adams Exp.
50 Philadelphia, Baltimore & Washington. Adams Exp.
66 Washington, Potomac & Chesapeake. Adams Exp.
68 Western Maryland. Adams Exp.
70 West Virginia Central & Pittsburg. Adams Exp.
SAME AS MAIN MAP.
DELAWARE.
RAILROADS.
2 Baltimore, Ohio & U. S. Exp.
6 Maryland, Delaware & Virginia. Adams Exp.
9 Pennsylvania. Adams Exp.
10 Phila., Baltimore & Washington. Adams Exp.
11 Philadelphia & Reading. United States Exp.
BALTIMORE
AND ENVIRONS.
SCALE OF STATUTE MILES.
SCALES.
Statute Miles. 11=1 Inch.
Kilometres. 18=1 Inch.
Rand, McNally & Co.'s New Business Atlas of Maryland and Delaware.
Copyright, 1903, by Rand, McNally & Co. Copyright, 1888, by Rand, McNally & Co.
LONGITUDE WEST FROM GREENWICH.
PENNSYLVANIA
VIRGINIA
WEST VIRGINIA
NEW JERSEY
DELAWARE
ALLEGANY
WASHINGTON
FREDERICK
CARROLL
HARFORD
BALTIMORE
GARRETT
HOWARD
MONTGOMERY
ANNE ARUNDEL
PRINCE GEORGE
CHARLES
ST. MARY
KING GEORGE
WESTMORELAND
NORTHUMBERLAND
QUEEN ANNE
KENT
TALBOT
CAROLINE
DORCHESTER
SOMERSET
WORCESTER
SUSSEX
CUMBERLAND
BRIDGETON
DOVER
SALISBURY
CHESTERTOWN
BALTIMORE
WASHINGTON
ANNAPOLIS
DISTRICT OF COLUMBIA
ALEXANDRIA
FAIRFAX
LOUDOUN
HARRISON
LEESBURG
FREDERICKSBURG
WARRENTON
MANASSAS
LURAY
WOODSTOCK
SNOW HILL
CRISFIELD
PRINCESS ANNE
ACCOMAC
OCEAN CITY
CAPE HENLOPEN
DELAWARE BAY
CHESAPEAKE BAY
POTOMAC RIVER
RAPPAHANNOCK RIVER
PATAPSCO R.
SEVERN R.
PATUXENT R.
CHESTER R.
SASSAFRAS R.
NANTICOKE R.
WICOMICO R.
PENSAUKEN R.
ATLANTIC OCEAN
Frederick
Hagerstown
Cumberland
Westminster
Towson
Ellicott City
Annapolis
Upper Marlboro
Leonardtown
Prince Frederick
Easton
Centreville
Denton
Cambridge
Salisbury
Princess Anne
Snow Hill
Crisfield
Oakland
Grantsville
Accident
Mountain Lake Park
Deep Creek Lake
Piney Creek Run
Silver Run
Little Pipe Creek
Big Pipe Creek
Monocacy R.
Catoctin Mt.
South Mt.
Blue Ridge Mts.
Sideling Hill
Green Ridge
Dan's Mt.
Backbone Mt.
Savage R.
Youghiogheny R.
Casselman R.
Gunpowder R.
Bush R.
Deer Creek
Susquehanna R.
Elk R.
Northeast R.
Sassafras R.
Chester R.
Choptank R.
Nanticoke R.
Wicomico R.
Pocomoke R.
Big Annemessex R.
Little Annemessex R.
Manokin R.
Monie Bay
Tangier Sound
Pocomoke Sound
Smith I.
Tangier I.
Watts I.
Fishing Bay
Hooper Strait
Kedge Straits
Broad Creek
Little Choptank R.
Transquaking R.
Blackwater R.
Fishing Creek
Honga R.
Little Blackwater R.
Marshyhope Creek
Gum Swamp
Broad Creek
Nanticoke
Seaford
Laurel
Delmar
Georgetown
Milton
Lewes
Rehoboth
Rehoboth Bay
Indian River
Indian River Bay
Little Assawoman Bay
Assawoman Bay
Fenwick I.
Isle of Wight Bay
Sinepuxent Bay
Newport Bay
Chincoteague Bay
Assateague I.
Assateague Channel
Chincoteague
Wallops I.
Metompkin I.
Cedar Creek
Millsboro
Dagsboro
Frankford
Selbyville
Bethany Beach
Fenwick Island
Ocean City
Berlin
Newark
Elkton
Perryville
Havre de Grace
Aberdeen
Bel Air
Belcamp
Edgewood
Joppa
Towsontown
Reisterstown
Westminster
New Windsor
Union Bridge
Taneytown
Emmitsburg
Thurmont
Middletown
Boonsboro
Hagerstown
Williamsport
Clear Spring
Hancock
Oldtown
Cumberland
Frostburg
Lonaconing
Westernport
Piedmont
Oakland
Grantsville
Accident
Mountain Lake Park
Deep Creek Lake
Piney Creek Run
Silver Run
Little Pipe Creek
Big Pipe Creek
Monocacy R.
Catoctin Mt.
South Mt.
Blue Ridge Mts.
Sideling Hill
Green Ridge
Dan's Mt.
Backbone Mt.
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Youghiogheny R.
Casselman R.
Gunpowder R.
Bush R.
Deer Creek
Susquehanna R.
Elk R.
Northeast R.
Sassafras R.
Chester R.
Choptank R.
Nanticoke R.
Wicomico R.
Pocomoke R.
Big Annemessex R.
Little Annemessex R.
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Tangier Sound
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Fishing Creek
Honga R.
Little Blackwater R.
Marshyhope Creek
Gum Swamp
Broad Creek
Nanticoke
Seaford
Laurel
Delmar
Georgetown
Milton
Lewes
Rehoboth
Rehoboth Bay
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Fenwick I.
Isle of Wight Bay
Sinepuxent Bay
Newport Bay
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Chincoteague
Wallops I.
Metompkin I.
Cedar Creek
Millsboro
Dagsboro
Frankford
Selbyville
Bethany Beach
Fenwick Island
Ocean City
Berlin
Newark
Elkton
Perryville
Havre de Grace
Aberdeen
Bel Air
Belcamp
Edgewood
Joppa
Towsontown
Reisterstown
Westminster
New Windsor
Union Bridge
Taneytown
Emmitsburg
Thurmont
Middletown
Boonsboro
Hagerstown
Williamsport
Clear Spring
Hancock
Oldtown
Cumberland
Frostburg
Lonaconing
Westernport
Piedmont

Howard & Edwards.
11. 25. 1906
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United States.

MINUTES

OF THE

PROCEEDINGS

BEFORE

THE HON. JOHN SERGEANT

OF

PHILADELPHIA,

IN

THE MATTER OF THE PEA PATCH ISLAND,

REFERRED TO HIM

AS

SOLE ARBITRATOR

BETWEEN THE UNITED STATES ON ONE SIDE, AND JAMES HUMPHREY ON THE OTHER.

= Washington, 1848 =
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A record of the proceedings in the matter of the Pea Patch island.—A reference to the Hon. John Sergeant, as sole arbitrator or referee.

October 11, A. D. 1847.

There appeared this day, at 11 o'clock, a. m., at the office of the said arbitrator, in Philadelphia, No. 93, Delaware 4th street, (south,) the following persons, viz: the Hon. John M. Clayton, of Delaware, the Hon. James A. Bayard, of the same State, both representing the United States of America; Jonathan T. Hudson, who stated himself to be an agent of James Humphrey. No other person appeared in behalf of said Humphrey.

The counsel of the United States expressed an opinion that a record or regular minute should be kept of all that was done. Mr. Sergeant introduced to them John Wm. Wallace, who, he said, would please to act as secretary. Adjourned by consent of parties, and with the approbation of the arbitrator, till Wednesday, October 13, 1847, at the same place, at 10 o'clock, p. m.

October 13, 1847.

Met pursuant to adjournment. The same persons present as before. Adjourned to the district court room, No. 1, S. E. corner 6th and Chesnut streets. Mr. Sergeant stated that it was a matter of public knowledge that the communications between Washington and Philadelphia were greatly disordered by the recent flood; that General Eaton and Governor Bibb, who represented one of the parties in the case, were not present; but that the agreement for submission, and an authority from the Department of War, would be read by Mr. Wallace, who had agreed to act as secretary. The clerk then read the following papers:

Articles of agreement made and concluded this twenty-seventh day of February, A. D. 1847, by and between William L. Marcy, Secretary of War, on the part of the United States, and James Humphrey, who claims to have now vested in him the full and perfect title, under a certain Henry Gale, deceased, to an island in the river Delaware, commonly known as the Pea Patch island, on which Fort Delaware is being built.

Whereas, a controversy exists between the United States and the said claimant under the said Henry Gale, deceased, as to the title to the said island, which was ceded to the United States by the State of Delaware; And whereas, by the 2d section of an act of Congress, entitled "An act making appropriations," &c., approved August 8th, A. D. 1846, the President of the United States is authorized to take such steps as he may deem advisable for adjusting

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the title to the Pea Patch island, and, should the same be found adverse to the United States, to cause the same to be adjusted by arbitration, according to an agreement entered into between the Secretary of War and the claimants, or their agent: *Now this agreement witnesseth:* That the said William L. Marcy, the Secretary of War, with the approbation of the President of the United States, and the said James Humphrey, the claimant under the said Henry Gale, have mutually agreed upon, and do hereby appoint John Sergeant, esq., of the city of Philadelphia, sole arbitrator, with full power and authority, at such times and places as he may appoint, to examine witnesses and receive evidence according to the rules of law and equity, and to decide the question of the title to the said Pea Patch island as derived by the United States from the State of Delaware, and by the said James Humphrey, claiming through the said Henry Gale, deceased, from the State of New Jersey; and his decision and award, made in writing, shall be final and conclusive between the United States and the said James Humphrey, claiming under the said Henry Gale, deceased. And it is further mutually agreed, that the said arbitrator may proceed to hear the matters submitted to him *ex parte*, on ten days' notice given by the said claimant, or his attorney, John H. Eaton, esq., to the solicitor of the treasury, or, on ten days' notice given by the solicitor of the treasury to the said claimant, or his said attorney. And it is further agreed, that either party may take depositions of witnesses before a commissioner, to be appointed by the arbitrator on reasonable notice to the said solicitor, or to the said claimant or his attorney. And it is further agreed that, before proceeding to a hearing before the said arbitrator, the said James Humphrey shall execute and deliver to the Secretary of War, a deed conveying all his right, title, and interest in the said Pea Patch island to the United States, which deed shall be held as an escrow until the said arbitrator has made his award under this agreement; and if the said award is in favor of the title of the United States, and against the said James Humphrey, claiming under the said Henry Gale, deceased, then the said deed shall become absolute, and have the same effect as if it had been originally delivered as an absolute deed, and not as an escrow. And it is furthermore mutually agreed between the parties that, in case the award of the said arbitrator is adverse to the United States, and in favor of the said James Humphrey, claiming under the said Henry Gale, deceased, then the Secretary of War shall select, or cause to be selected, two citizens of the State of Pennsylvania, and the said claimant shall also select two citizens of the same State, and the four citizens so selected shall choose a fifth citizen of the same State, and the said five citizens so selected shall constitute a board of appraisers, and the said board, or a majority of them, shall have full power and authority to ascertain and determine the value of the Pea Patch island, and the sum to be paid by the United States to the said claimant under the said Henry Gale, deceased. The appraisers, before making any valuation, shall be sworn or affirmed faithfully and impartially to discharge their duty;

and the following rules shall govern them in ascertaining the value of the said island, and the sum to be paid to the said James Humphrey for the title of the said Henry Gale, deceased. They shall ascertain and determine the value of the said island, considered as private property, as it was at the time the United States took possession of the same. They shall calculate and allow, at the rate of 6 per cent. per annum, interest on the value so ascertained, from the time the United States took possession of the island to the date of his award, making rests at the end of each period of six years, and adding the interest for six years to the principal, so as to convert interest into principal at the end of each six years; and they shall allow such damages as they deem just and reasonable to the claimant, by reason of any expenses actually incurred by him, or those under whom he claims in the prosecution of the said claim.

Lastly, in making their estimate of value, the said appraisers shall not take into count any improvements or expenditures made on the said island by the United States. The determination of the said appraisers, or a majority of them agreeing, shall be in writing, and shall be binding upon the United States and upon the claimant as to the value of the said island and the sum to be paid to the said claimant for the title of the said Henry Gale, deceased, to the said island, now vested in him. The Secretary of War further agrees, in the event of the title being decided adversely to the United States, and in favor of said claimant, to ask of Congress, at the session thereof next ensuing, the appraisement by the board of appraisers hereby constituted, an appropriation for the payment of the sum ascertained by the appraisement; and, upon payment of the said sum, the said deed, by the said claimant to the United States, delivered as an escrow as hereinbefore provided, shall become absolute, and have the same force and effect as if originally delivered as an absolute deed; provided, nevertheless, that it shall, before payment of the sum ascertained by the said appraisement or any part thereof, be made to appear, to the satisfaction of the Attorney General of the United States, that the title of the said Henry Gale, deceased, to the Pea Patch island is, by the said deed, vested in the United States, free from all incumbrances; and that any further assurances or conveyances necessary and proper, in the opinion of the attorney general, for conveying the title of the said Henry Gale, deceased, to the United States, free from all incumbrances, shall be executed, by the proper parties, before the payment of the said sum ascertained by the said appraisement or any part thereof. And it is further agreed between the parties, that the said board of appraisers shall have authority to examine witnesses on oath or affirmation, for the purpose of ascertaining the value of the said island. The Secretary of War further agrees to ask from Congress, at its present session, a contingent appropriation of thirty thousand dollars, to be applied, subject to the provisions of this agreement, to the extent it may be requisite to the payment of the sum ascertained by the said appraisement to be made as hereinbefore provided, in case the decision of the question

of title by the arbitrator is adverse to the United States, and in favor of the said claimant under the said Henry Gale, deceased.

W. L. MARCY, [SEAL.]
Secretary of War.
JAMES HUMPHREY, [SEAL.]

Executed in presence of R. H. GILLET,
Witness as to W. L. MARCY, secretary; and
C. M. EDSON, as to signature of J. Humphrey.

By direction of the President, and agreeably to an act of Congress, approved the 8th of August, 1846, section 2, you are hereby appointed to arbitrate and adjust the title to the Pea Patch island, in the Delaware river.

[SEAL.] Given under my hand and the seal of the War Department, this 29th day of September, 1847.

W. L. MARCY,
Secretary of War.

To JOHN SERGEANT, Esq.

These papers being read aloud: On motion of the counsel of the United States, it was ordered by the arbitrator that a commission be issued to James C. Mansfield, of Newcastle, in the State of Delaware, to take the depositions of witnesses on behalf of the United States on interrogatories filed in ex parte, on fifteen days' notice to the claimant or to John H. Eaton, his solicitor; and that the secretary of reference make out the commission.

Interrogatories were filed in the above order, and are annexed in copy. See exhibit No. 1.

Adjourned until Thursday, October 28, 1847, at 10 o'clock, a. m., at this same place, viz: district court room No. 1, southeast corner Sixth and Chesnut streets.

OCTOBER 28, A. D. 1847.

Met pursuant to adjournment, at 10 o'clock, a. m., at the district court room No. 1, southeast corner of Sixth and Chesnut streets. Present: The arbitrator, the clerk, the Hon. J. M. Clayton and the Hon. J. A. Bayard, representing the United States, and the Hon. George M. Bibb and the Hon. John H. Eaton, representing James Humphrey. The district court being about to occupy the room, the arbitrator adjourned to the supreme court room, (nisi prius branch,) and took his place upon the bench. He stated that since his acceptance of the post of arbitrator, he had received several letters from counsel on both sides, inquiring, proposing, and suggesting various things, which letters it was not strictly formal or proper to address to him, though that course was naturally enough adopted prior to organizing; that he deemed it

well to have all these letters now openly read, so that if either party had any objection to make to them, or to his answers to them, or to anything in either, such objection might be made now in the outset of the case, and heard and settled before entering into the merits of the case. The counsel on both sides approved that course, and thereupon the clerk read aloud the following letters:

John H. Eaton to Hon. John Sergeant, Washington, August 26, 1847.

John Sergeant to General Eaton, Schooley's Mountain, August 30, 1847.

John Sergeant to R. H. Gillett, esq., Solicitor of the Treasury of the United States, same date; enclosing copy last.

John M. Clayton to Hon. John Sergeant, Newcastle, Delaware, August 28, 1847.

John Sergeant to Hon. J. M. Clayton, Schooley's Mountain, September 2, 1847.

John M. Clayton to Hon. John Sergeant, Newcastle, Delaware, September 8, 1847.

John Sergeant to Hon. J. M. Clayton, Philadelphia, September 23, 1847.

R. H. Gillet, Solicitor of the Treasury of the United States, to James Humphrey, Washington, D. C., September 29, 1847.

R. H. Gillet, Solicitor of the Treasury of the United States, to John H. Eaton, Washington, D. C., September 29, 1847.

R. H. Gillet, Solicitor of the Treasury of the United States, to John M. Clayton, office Solicitor Treasury, September 29, 1847.

J. M. Clayton to John Sergeant, Newcastle, October 5, 1847.

John Sergeant to Hon. John M. Clayton, Philadelphia, October 7, 1847.

J. H. Eaton and G. M. Bibb to Hon. John Sergeant, Washington, October 5, 1847.

John Sergeant to General Eaton and Governor Bibb, Philadelphia, October 6, 1847.

John Sergeant to Hon. J. M. Clayton, Philadelphia, October 6, 1847; enclosing copy of preceding.

J. M. Clayton to Hon. John Sergeant, Newcastle, October 10, 1847.

The letters having been all read, in full, all the counsel agreed that no objection could be taken to anything in any of them; the arbitrator said he was now ready to proceed with the case. It was agreed that the United States should begin, not waiving thereby any right to which they might be entitled by being in possession, or by being in the position of defendants in an action of ejectment, but merely to regulate proceedings. They then offered in evidence.

1. *An original deed*, as it was said, from Charles II., king of England, to James, duke of York, his heirs and assigns, dated "the two and twentieth day of March, in the five and thirtieth year of our reign;" said by the V. S. to be 1682–'83; in these words:

Charles the Second, by the grace of God, &c., to whom these presents shall come, greeting: Know ye, that wee, for divers good causes and considerations us thereunto moving, of our especial grace, certain knowlege, and mere motion, have given and granted, and by these presents, for us, our heirs and successors, doe give and grant unto our dearest brother, James, duke of York, his heirs and assigns, all that the town of Newcastle, otherwise called Delaware, and fort therein, or thereunto belonging, situate, lying, and being *between Maryland and New Jersey*, in America; and *all that tract of land lying within the compasse of a circle of twelve miles aboute the said towne, situate, lying, and being upon the river Delaware, and all islands in the said river Delaware; and the said rivere and soyle thereof lyeing north of southernmost parte of said circle of twelve miles about the said towne;* and all that tract of land upon the Delaware river and bay, beginning twelve miles south from the said towne of Newcastle, otherwise called Delaware, and extending south to Cape Lopen. Together with all the lands, islands, soyle, rivers, harbors, mines, minerals, quarrys, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowlings, and all other royalties, privileges, profits, commodities and hereditaments to the said towne, fort, tracts of land, islands and premises, or to any or either of them belonging or appertaining, with their and every of their appurtenances, scituate, lying, and being in America; *and all our estate, right, title, interest, benefit, advantage, claim, and demand* whatsoever, of, in, or to the said towne, fort, lands, *premises, and of every part and parcel thereof.* To have and to hold the said *town of Newcastle*, otherwise called Delaware, and fort; and *all and singular the said lands and premises*, with their and every of their appurtenances hereby given or granted, or hereinbefore mentioned, to be given unto our said dearest brother, James, duke of York, his heirs and assigns forever.

The deed continues fixing the rent "at foure beaver skins" yearly, when the same shall be demanded, or 90 days after. The premises are to be holden "as of our manor of East Greenwich, in our county of Kent;" powers of government are conferred by it; and, finally, the letters patent are declared to be good and effectual in law, notwithstanding the not well, or true reciting, or mentioning, of the premises, or any part thereof, or the limits or bounds thereof, or of any former or other letters patent or grants whatsoever, made or granted, of the premises, or of any part thereof, by us, or any of our progenitors, unto any person whatsoever.

II. An exemplification of this patent, or deed, under the great seal of England; said exemplification dated 16th July, sixth year of Queen Victoria.

III. A printed copy of the same paper, said to be in the votes and proceedings of the House of Representatives of the province of Pennsylvania, Philadelphia: Franklin & Hall, 1754: folio, vol. iii, p. 590. This book was not produced, but the counsel has leave to bring it in afterwards. (See page .)

IV. A sworn copy, under the seal of the office of the mayoralty of the city of London, dated February 4, A. D. 1735, certifying

that John Page, of Austin Fryers, London, gent., "a person well known, and worthy of credit," had compared the paper annexed, purporting, &c., and found it to be a true copy of the same letters patent which, "many years ago, came into the custody of this deponent among other grants and deeds of Wm. Penn, esq., deceased, late proprietary governor," &c. &c.

The United States then read in evidence the title from the duke of York to William Penn, as follows:

Lease.

An original deed signed and sealed, *but not witnessed*, from the duke of York, dated August 21st, in the 34th year of Charles the II., to *Wm. Penn.* Consideration, his father's services and 10 shillings. It demises, grants, bargains, and sells unto the said William Penn, all that the town of Newcastle, otherwise called, &c.; *and all that tract of land lying within the compass or circle of* 12 *miles about the same, situate, lying, and being upon the river Delaware in America, and all islands in the said river Delaware, and the said river and soil thereof, lying north of the southernmost part of the said circle of* 12 *miles*, &c., together with all rents, services, royalties, franchises, duties, &c., and all the *estate, interests*, and powers whatsoever of his said royal highness in or to the same, to have and to hold all the same granted, or intended to be granted, *town, circle, islands*, to William Penn, his executors, administrators, and assigns for 10,000 years, from the day before the date, without imp. of waste. Yielding rent 5 shillings lawful money at feast of St. Michael, which Penn, for himself, his executors, administrators, and assigns, covenants he, his heirs, executors, administrators, or assigns, will pay.

Lease.

An original deed, sealed and delivered in the presence of *witnesses*, from the duke of York to William Penn, dated August 24th, in the 34th year of the reign of Charles II., 1682. Consideration, the regard which the duke had for the memory of Wm. Penn's father, also the sum of 10 shillings, conveys *all that town of Newcastle, and all that tract of land lying within the compass or circle of* 12 *miles about the same, situate, lying, and being upon the river Delaware, and all islands in the same river, and the said river and soyle thereof, lying north of the southernmost part of the said circle of* 12 *miles about the said town;* to have and to hold to the said William Penn, his *executors, and administrators, and assigns* for 10,000 years, at a yearly rent of 5 shillings.

Lease.

An original deed, sealed and delivered in the presence of witnesses, from the duke of York to William Penn, dated August

24th, in the 34th year of the reign of Charles II., 1682. Consideration, the regard which the duke had for the memory of Wm. Penn's father; also sum of 10 shillings; bargains, sells, lets, and to farm lets, all that *tract of land* upon Delaware river and bay, beginning twelve miles south from the town of Newcastle, and extending south to the Horerkilns, otherwise called Lopen, together with free and undisturbed *use and passage into and out of all harbors, bays, waters, rivers, isles, and inlets, belonging to, or leading to the same*, together with the *soils*, fields, woods, underwoods, mountains, and hills, fennes, *isles, lakes, rivers, rivulets, bays, and inlets, situate in*, or *belonging unto, the limits and bounds aforesaid, with all the rights* of the duke to the same, to have and to hold for the space of 10,000 years; rent one rose, at each feast of St. Michael, the Arch angell. Wm. Penn covenants that he will erect offices of registry, &c., within one year, and is to yield one-half the profits of the offices to the duke, who has a right of distress if his rents are not paid within 20 days after the time when they are payable.

Deed of feoffment.

An original deed, sealed and delivered in the presence of witnesses, from the duke of York to William Penn, dated August (No. I) 24th, in the thirty-fourth year of the reign of Charles II., 1682. Consideration, the services of Wm. Penn's father, and 10 shillings, for which he bargains, sells, enfeoffs, and confirms unto Wm. Penn, *his heirs, and assigns, forever, all that the town of New Castle*, otherwise called Delaware, and *all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying, and being upon the river Delaware; and all islands in the said river Delaware, and the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles about said town, and all the rights, titles, interests, powers, and property, claim, or demand* of the duke, in or to the same; to have and to hold the same to William Penn, *his heirs, and asssigns forever*, subject to a rent of five shillings lawful money. *The duke then covenants and grants to and with William Penn, his heirs, and assigns, that he will any time thereafter, within seven years next ensuing the date of the deed, upon request, and at the cost and charges of Wm. Penn, his heirs, and assigns, make and execute, or cause to be made and executed, all and every such further act and acts, conveyances and assurances in the law whatsoever, for the further conveying and assuring the said town, and circle of twelve miles of* land about the same, and *islands, and all other the premises, with the appurtenances*, as by counsel of the said William Penn, learned in the law, shall be reasonably devised, advised, or required. The deed then constitutes *John Moll*, esq., and Ephraim Herman, gentlemen, jointly, and *either of them, severally*, attorneys in behalf of the duke, and for him to *enter into and take possession and seizen of the premises conveyed, and, after such possession had and taken, to deliver possession and seizen to William Penn, his heirs, and assigns, or his or their attorney's* ratifying and approving, &c.

Benjamin David, of the city of Philadelphia, residing Delaware Fouth street, in the said city, above Spruce street, having been sworn by the mayor of the city of Philadelphia, deposed and said as follows: I became in custody of these four deeds (the deeds above, marked with the letters J. R. Coates) as agent of Jacob G. Morris, who was the son-in-law of J. R. Coates, deceased. Mr. Coates received them as agent or attorney of the Penn estates, during a visit to England, from some of the members of the Penn family. I speak of the deed from King Charles to the duke of York. I cannot speak of the others. I suppose they came to Mr. Coates's possession in the same way. Mr. Coates came from England 10 or 15 years ago. I understood, it was generally understood, that Mr. Coates was the agent of the Penns for managing their estates in America. I am the brother-in-law of Mr. Morris. It is so long ago since I heard Mr. Coates narrate how he came possessed of these deeds, that I cannot speak with absolute confidence of what was done. I think he told me that, being at Stoke Pogies, Mr. Penn asked him if he would like to go into the charter room, where he might find some papers that would be interesting to him as an American; that he was welcome to any of them he wanted. Mr. Coates found in the charter room these deeds, as I suppose, and also the charter of the State of Pennsylvania.

Cross examined.

I am not able to say that Mr. Coates continued to be agent of the Penn estates till the time of his death. I never understood that there was any revocation of his authority. He was living within seven years. Mr. Morris is now in Europe. The box was first opened by me this morning.

This evidence having been read over to the witness, was said, by him, to be correctly taken down. The arbitrator directs that all the testimony be read over to the witnesses, when taken, and be verified.

An exemplification, to which is attached a certificate, (No. 2,) under the seal of the office of the mayoralty of the city of London, dated in London, June 16, in the ninth year of George II., and A. D. 1735, which certificate states that at a court of the king's majesty, holden before the lord mayor and aldermen of the city of London, John Page, of Austin Friars, gentleman, appeared, aged 50 years and upwards, being a person well known and worthy of good credit, and on oath, &c., did declare, &c., that he had examined the paper copy, annexed, purporting, &c., and of the endorsement on such indenture, with the original indenture of bargain and sale, whereof it purported to be a copy, and that the annexed is a true copy of the said indenture, and of all the endorsements thereon, and which indenture appears to be, and the deponent believes is, under the hand and seal of the late King James, while duke of York, and to be by him executed.

It is dated the 24th August, in the thirty-fourth year of Charles

II., A. D. 1682. Consideration, the services of William Penn's father and 10 shillings; bargains, sells, enfeoffs and confirms to William Penn, his heirs and assigns forever, all that tract of land upon the Delaware river and bay, beginning twelve miles *south from Newcastle*, and extending south to Capin Lopin, together with free and undisturbed *use and passage into and out of all harbors, bays, waters, rivers*, isles and inlets *belonging to or leading to the same*; together with the *soil*, fields, woods, under-woods, mountains, hills, fennes, *isles, lakes, rivers, rivulets, bays and inlets*, situate *in* or *belonging unto the limits and bounds aforesaid*, together with all sorts of minerals, and all the *estate, interest*, royalties, franchises, powers, privileges and immunities whatsoever, of the duke therein, or *in or unto any part thereof*, reserving a right of way. To have and to hold to William Penn, his heirs and assigns, to his and their use forever. To be holden of ye duke and his heirs, as of their castle of New York, in free and common socage. Rent, one rose annually, at the feast of St. Michael's. Penn *covenants that he, his heirs or assigns, will, within one year, set up one or more offices of registry for setting down and registering all manner of rents and oyer profits, and pay the duke half of them*; and if the payment is behind twenty days, the duke, his heirs and assigns may enter upon and distrain. The duke for himself, his heirs and assigns, covenants and grants to and with William Penn, his heirs and assigns, that the duke, his heirs and assigns, will at any time hereafter, during the space of seven years next ensuing ye date of the deed, execute such further assurance, &c., as ye counsel of Penn, his heirs and assigns may advise, &c *Power of attorney to John Moll and Ephraim Herman, by ye duke, to enter upon all ye premises hereby granted or mentioned, and intended to be, or upon any part for the whole, and to take and receive possession and seizen thereof, and the same afterwards to deliver to William Penn, his heirs and assigns, or to his or their attorney*, ratifying, &c. The endorsement is: "Entered in the office of records for the province of New York, in liber E, folio 38, the 21st of November, 1682.

"T. JOHN WEST, Sen."

This deed is witnessed by Jo. Werden, Geo. Mann.

An exemplification, under the great seal of the province of New York, dated 29th November, 1726, of three records (No. III) in the secretary's office of our province of New York, in a book of patents and commissions, &c.

1. A deed from the duke of York to William Penn, in fee. This appears to be a copy of the deed already produced in original, and marked by me as No. I, being a deed for the *town of Newcastle, the 12 miles circle about the town, upon the Delaware and all islands in the said river, and the said river and soil thereof lying north of the southernmost part of the said circle*, &c.

2. A deed between the same parties in fee. This appears to be a copy of a deed of which no original was produced, but of which there was an exemplification under the seal of the city of London,

marked as No. II. It is for that part of Delaware State which is south of the south part of the circle.

3. A paper, or record, certified to be found in a book entitled Miscellaneous Entries, begun in the year 1682, and ending in the year 1683. *The record of the commander and council, declaration on Esquire Penn's grant for Newcastle, Saint Jones, and Whorekills, &c. By the commander and chief in council. Whereas, his royal highness hath been graciously pleased, by indenture, under his hand and seal, bearing date the 24th day of August last past, for the consideration therein mentioned, to bargain, sell enfeoff, and confirm, unto William Penn, esquire, his heirs and assigns forever, all that the town of Newcastle, otherwise called Delaware, and all that tract of land lying within the compass or circle of 12 miles about the same, with all islands and the river and soil thereof, lying north of the southernmost part of the said circle, and all the rents, services, royalties,* franchises, duties, jurisdictions, and liberties thereunto belonging; and, by another indenture, of the same date, for the consideration therein likewise mentioned, hath also bargained, sold, enfeoffed, and confirmed, unto the said William Penn, esquire, his heirs and assigns forever, all that tract of land upon the Delaware river and bay, beginning 12 miles south from the town of Newcastle, otherwise called Delaware, and extending south to the Whorekills, otherwise called Cape Hen Lopen, with all isles, rivers, rivulets, bays, and inlets, royalties, franchises, powers, privileges, and immunities, whatsoever, and in and by the said indentures, appointed and authorized John Moll, esquire, and Ephraim Harman, gentleman, to deliver to the said William Penn, free and actual possession of the premises, *as by the said indentures here produced and shown to us, and by us well approved of and entered in the public records of the province, doth and may more at large appear, and we being thereby fully satisfied of said William Penn's right to the possession and enjoyment of the premises, have, therefore, thought fit and necessary to signify and declare the same to you to prevent any doubt or trouble that might arise or accrue, and to give you your thanks for* your good services done in your several offices and stations during the time you remained under his royal highness's government. *Expecting no further account than that you readily submit and yield all due obedience and conformity to the powers granted to the said William Penn in and by the said indentures*, in the performance of which, we wish you all happiness. *Dated in New York*, the 21st day of November, *one thousand six hundred and eighty-two. To the several justices of the peace, magistrates, and other officers, at Newcastle, Saint Jones's.* Deale als. Whorekill, at Delaware, *or within any of the bounds and limits above mentioned.*"

An ancient paper, certified by Tench Coxe, secretary of Pennsylvania land office, to have been on "file therein on the 7th day of January, 1800," and upon the day of the date of the certificate, 24th August, 1801, to have been delivered, under an act of the assembly of Pennsylvania, to the agent of the State of Delaware.

This paper purports to be "copies of several matters of record

relating to Delaware." It is in English, and purports to be certified by W. Burnet, captain general and governor-in-chief of the provinces of New York, New Jersey, and territories depending in America, vice admiral, &c., to be a sworn copy, and as to part sworn, translation of original records remaining in the office of the secretary of the province of New York. *The paper professes to be under the great seal of the province of New York, and is given at Fort George, in New York, this 29th day of November, and in the 13th year of his Majesty's reign.* There is *no* seal of any sort to the paper. It contains copies of letters, "actes de notoriete," &c.; correspondence of British admiral and Stuyvesant; history of settlement of Delaware by Swedes and Dutch about 1629. *This paper was offered to prove several historical matters; but particularly as containing evidence of a grant from the Indians of the territory claimed in the suit.* The deed reads thus:

"We, director and council of New Netherland, residing on the Island Manhattans and Fort Amsterdam, under the government of their high and mightinesses, the lords states general of United Netherlands and the incorporated West India Company at the chamber of Amsterdam, testify and declare by these presents:

"That on the day of the date here under written, before us in their own persons came and appeared Quisquak Offs, Ecgonques, Sironcherson, inhabitants of their town, situate on the south corner of the bay of the south river, and declared voluntarily and premeditately, and by the especial direction of the rulers, with the consent of the common people thereof, that they had since the 1st day of the month of June, in the year 1629, now last past, for and by reason of certain parcel of merchandises which they acknowledged, before the passing of these presents to their good liking and satisfaction, to have received in their power and hands, and delivered to them in a just, true, and free property; to have transported, released, given over, and assigned, as they do by these presents transport, release, give over, and assign, for and to the behoof of the Honorable Mr. Samuel Godijs, now absent, on whose words we, on due stipulation, do accept thereof, to wit: The lands to them belonging, situate nigh the south river on the south side of the aforesaid bay, called by us the bay of the south river, stretching in length from Cape Hinloop to the mouth of said south river, about eight large miles, and up into the country in the breadth of half a mile, stretching to a certain low place or meadow, by which said meadow these limits may be evidently enough distinguished; and that with all the action, rights, and jurisdiction to them in their aforesaid quality belonging, constituting and surrogating the before mentioned Honorable Mr. Godijs in their stead, estate, real and actual possession of the same, and also giving him full and irrevocable power and authority and especial direction, *tan quam actor et procurator in rem suam ac proprium*, to the said Honorable Mr. Godijs, or whom hereafter might obtain his action to enter on, hold, possess, dwell upon, use, and detain the above mentioned land; also therewith and thereof to transact

and dispose thereof as his honor, with his own will and by lawful title acquired lands, may do; without that, they, the releasors thereunto any part, right, action, or superiority, any more in the last thereunto have reserve or keep, be it of property, command, or jurisdiction. But to the behoof aforesaid of all the same, from henceforth and forever, desisting, releasing, disclaiming, and renouncing, and by these presents further promising not only this their transport, and what by virtue thereof may be done from henceforth and forever to hold, follow and accomplish, firm, valid, infrangible and irrevocable, but also the same of lands to warrant and defend against every one, free of all demands, trouble, and incumbrances, to be made thereon by any body, all on good faith, without fraud or deceit. In witness whereof, we have confirmed these presents with our usual signa and our seal hereunto appending, done on the Island Manhattans, the 15th of July, 1630."

The foregoing paper appears to come from a "Book of Dutch patents, N. A., folio 3."

The document offered in evidence by Mr. Clayton proceeded further as follows:

"In a book of Dutch records, begun the 8th April, 1638, the instrument which follows has no date to it. But what goes just before is dated the 6th May, 1638, and what follows is dated 17th of May, 1638.

"I, William Keep, director general of New Netherland under the government of their high and mightinesses the lords states general of the United Netherlands, and the incorporated West India Company at the chamber of Amsterdam, make known to you, Peter Minmict, as he causes himself to be called, commander in the service of his royal Majesty of Sweden, that the whole south river of New Netherland has been many years in our possession, and above and below settled by our forts, and also sealed with our blood, which has happened even during your direction in New Netherland, and well known to you. Now because you came between our forts and begins to build a fort there to our damage and prejudice, which, nevertheless, will be never suffered by us, and that we are also well assured that her royal Majesty of Sweden has given you no orders to build fortifications in our rivers or along our coasts, wherefore we, in case you proceed in the building of fortifications, or attempt anything to our prejudice, do by these presents protest for all charges, damages and interests, as also of all miseries, bloodsheds, trouble and damages, which thereby in times to come may happen to the company, and that we will maintain our right in such a manner as we shall find most suitable thus done."

James A. Bayard, Esq., states, and he says he is willing to swear, that the three papers, Nos. II., III. and IIII., were found among the professional papers of his late father, James A. Bayard, Esq., deceased, of the State of Delaware.

Mr. Clayton puts in evidence, "Laws of the government of New-

castle, Kent and Sussex upon Delaware, published by order of the assembly," by Franklin & Hall, Philadelphia, 1752; a folio of 363 pp., and commonly called lower county laws.

He cited p. 3: the duke of York's deed of feoffment of Newcastle and 12 miles circle to William Penn, 1682, August 24. Same as deed No. I.

P. 5: the duke of York's deed of feoffment of a tract of land 12 miles south from Newcastle to the Whorekills, to William Penn, 1682, August 24. Same as No. II.

P. 8: the charter of privileges granted by William Penn, Esq., to the inhabitants of Pennsylvania and territories, dated October 28, 1701.

Also puts in evidence, "Laws of the State of Delaware from the 14th of October, 1700, to the 18th day of August, 1797; in two volumes. Published by authority; Newcastle, Samuel and John Adams, 1797.

He cited volume 1, appendix 1: "The duke of York's deed of feoffment to William Penn," August 24, 1682. (No. I.)

Vol. 1, appendix 4: The duke of York's deed of feoffment of a tract of land 12 miles south from Newcastle to the Whorekills, to William Penn, August 24, 1682. (No. II.)

Vol. 1, appendix 8. An act of union for annexing and uniting of the counties of Newcastle, Jones and Whorekills, alias Newdale, to the province of Pennsylvania, and of naturalization of all foreigners in the said province and counties annexed.

This act, dated at Chester, December 7, 1682, and under the hand and broad seal of William Penn, proprietary and governor of this province, recites: that it had pleased the duke of York to grant unto William Penn in fee "all that tract of land from 12 miles northward of Newcastle, on the river Delaware, down to the south cape, commonly called Cape Henlope, and by the proprietary and governor now called Cape James, lying on the west side of said river and bay, formerly possessed by the Dutch, and bought by them of the natives, and first surrendered upon articles of peace to the king's lieutenant governor, Colonel Nicholls, and a second time to Sir Edmond Androse, lieutenant governor to the said duke; and hath been by him *quietly possessed and enjoyed, as also the said river Delaware, and soil thereof, and all islands therein*, lately cast into three counties, called Newcastle, Jones's and Whorekills, alias Newdale," together with the royalties, &c., &c.; as by two deeds of feoffment bearing date August 24, 1682, doth more at large appear.

Same book, vol. 1, appendix, page 30, "An act for the effectual establishment and confirmation of the freeholders of the province and territories, their heirs and assigns, in their lands and tenements;" which is dated A. D. 1700; and after reciting that, at the first laying out and settling of lands in Pennsylvania and territories thereunto belonging, neglects and errors had been committed through the want of experience and care in the officers, to the wrong of the proprietary and the insecurity of your people. For remedy thereof, and for the safety of the said province and territories in

general, and that the people may be completely and absolutely settled and fully secured in their rights and titles to land and all occasions of difference and contest thereupon may forever hereafter be prevented and removed;" enacts that all tracts and parcels of land taken up within this province and territories, and duly sealed by virtue of letters patent, or warrants obtained from governors or lawful commissioners under the crown of England, before the king's grant to the proprietary and governor for this province, (except the same was had by fraud or deceit,) shall be quietly enjoyed by the actual possessors, their heirs and assigns; and that land and tracts of land, duly taken up by virtue of warrants obtained pursuant to purchases made and had from the proprietary and governor, or in pursuance of any commission or power granted by the proprietary to any other person, (except as before excepted, and except where the same does interfere with other persons' just rights and claims,) shall be quietly and peaceably enjoyed by, and confirmed to, the possessor, (according to the said warrants,) his heirs and assigns forever; and although no patent hath been granted, yet if peaceable entry and possession hath been obtained by warrants or otherwise, as aforesaid, and thereupon quiet pessession hath been held during the space of seven years, or more, such possession or such entry as aforesaid shall give an unquestionable title to all such lands, according to the quantity they were taken up for, and shall be deemed and held good, and be confirmed by the proprietary to the seators or possessors thereof forever."

Same book, appendix page 37. "The charter of privileges granted by William Penn, esq., to the inhabitants of Pennsylvania and territories.

"Laws of the State of Delaware to the year of our Lord 1829, inclusive," &c. Arranged and published under the authority of the General Assembly, Wilmington, Delaware—Porter & Son, 1829, page 73. "An act ceding to the United States of America the jurisdiction which this State has over the Pea Patch, on certain conditions therein mentioned."

Sec. 1. *All the right, title, and claim, which this State has to the jurisdiction and soil of the island in the Delaware, commonly called the Pea Patch*, be and the same *is hereby ceded to the United States of America, for the purpose* of erecting forts, batteries, and fortifications, for the protection of the river Delaware and the adjacent country, *upon the condition, nevertheless*, that the said forts, batteries, and fortifications, shall be erected and kept up at the expense of the United States; and, also, that all process, civil and criminal, issuing under the authority of this State, may be executed and served within the place, the jurisdiction of which is hereby ceded as aforesaid in the same manner as if no such cession had been made.

Passed May 27, 1813.

Votes and proceedings of the House of Representatives of the Province of Pennsylvania, Philadelphia—Franklin & Hall, 1754, vol. 3d, page 590. "King Charles II., grant of the town of New-

castle and the three lower countries to the Duke of York," 22d March, in 35, Car. II.

"Map of Delaware bay and river, founded upon trigonometrical survey, under the direction of F. R. Hasler and A. D. Bache, superintendents of the survey of the coast of the United States," &c.; published in 1846—A. D. Bache Superintendent. This map has on it, in pen mark, a twelve miles circle

It is admitted by counsel on both sides that the Pea Patch is but five miles from New Castle.

A paper certified, under the seal of the circuit court of the United States for the Delaware district, to be a true copy of the record in the office of the clerk of that court in the suit of John Doe, lessee of the United States of America *versus* Richard Roe, casual ejector, John Corkwin, Lewis Grubb, John Pile, B. Cooper, James Colvin, Edward Powers, William Powell, N. Derrickson, William Long, and Isaac Jones, tenants in possession.

The service on John Corkwin, Thomas Day, James Colvin and Thomas Briggs, Edward Powers, and Isaac Jones, May 20, 1839.

May 29, 1839. Judgment by default against Richard Roe, casual ejector and defendant.

May 24, 1843. Sciria facias.

October 18, 1843. Judgement upon the sciria facias.

November 21, 1843. Hab. facias posses.

November 27, 1843. Possession delivered.

(Adjourned till to-morrow at 11 o'clock, in the same place.)

—

Friday, October 29, 1847.

Met pursuant to adjournment. The same counsel present as before.

Mr. Clayton produces an ancient folio book, said to be the complainant's paper book, in Penn *versus* Baltimore. 1 Vesey, 444.

Produced to show generally the title of the United States, and particularly at page 56. That the very and original deed of the king to the duke of York, here produced by the United States, was an exhibit in that case, and was in possession of Mr. *Penn.* After exhibiting, from the chappel of the rolls, a copy "of these letters patent," and noting the disbelief of Lord Baltimore, as expressed in his answer, that the king *did ever expressly grant* these lower counties to the duke of York, which the paper book remarks, "it is plain from the above that they were." And noting Lord Baltimore's argument, that being made *after* the deed by the duke to Penn, this grant must have been for the *duke's use, and not for Penn's*, the paper book proceeds: "We have a fact that will determine that question, *for we have the very original charter itself*, under the great seal, in *our* custody, ready to produce, which, if the duke had intended for *himself*, and to *defeat* our title by, *he* would have kept and *not Mr. Penn, who was at this time of passing it, and for a considerable time longer over in America.*"

He cites "Opinions of eminent lawyers on various points of Eng-

lish jurisprudence, chiefly concerning the colonies, fisheries, and commerce of Great Britain, by George Chalmers, esq., F. R. S. and S. A., London, 1814," p. 59, vol. 1.

8. "*Of the king's right to the islands in the river Delaware,*" by the attorney and solicitor general, Raymond and York, in 1721.

To the right honorable, the lords commissioners of trade and plantations.

May it please your Lordships: In obedience to your lordships commands, signified to us by Mr. Popple, by his letter of the 30th June last, whereby he transmitted to us the annexed copy of two clause, extracted out of the charters of New Jersey and Pennsylvania, whereby the boundary of these two provinces are ascertained, and thereupon desired an opinion whether the Delaware river, or any part thereof, or the islands therein lying, are, by the said clauses, conveyed to either of the said provinces, or whether the right thereunto doth still remain in the crown? We have perused the said clauses, and have been attended by the agents of the parties, who claim the province of Pennsylvania, and their counsel who laid before us a copy of the letters patent granting the said province, and have heard what hath been alleged on both sides, and upon consideration of the whole matter, are of opinion that no part of Delaware river, or the islands lying therein, are comprised within the granting words of the said letters patent, or of the said annexed extracts of the grant of New Jersey; but we conceive that the right to the same still remains in the crown.

ROBERT RAYMOND,
PHILL. YORKE.

August 5, 1721.

Exemplification, under the seal of the office for recording of deeds, at Newcastle, in and for Newcastle county, Delaware, and dated August 27, 1847, of the following papers:

1st. His royal highness's grant to Wm. Penn, esq., of a tract of land, twelve miles south of Newcastle, to Whorekills; this appears to be the same deed as No. II, except that these words are added: "Entered the 21st of November, 1682, secretary's office of the Province of New York. The above written is a true copy of the record remaining in the said office, comp'd and ex'd per William Sharpas, sec'y This deed, or copy of a deed, appears to have been recorded in Delaware, the 16th March, 1724.

2. "His royal highness's grant to William Penn, esq., of Newcastle and 12 mile circle."

This appears to be the same as No. 1, except that these words are added: "Entered the 21st November, 1682, secretary's office of the Province of New York, May 20th, 1700. The above is a true copy of the record remaining in the said office, examined per Will. Sharpas, recorded in the Roll's office, at Philadelphia, Patent book A, No. II, pp. 118, 119, 120, the 28th March, 1701, by me, Tho. Story.

This deed, or a copy of a deed, appears to have been recorded in Delaware, the 16th March, 1724.

3. The following document:

We, underwritten, being inhabitants of the town of Newcastle, upon Delaware river, having heard the indenture read, made between his royal highness, James, Duke of York and Albany, etc., and William Penn, esq., governor and proprietor of the province of Pennsylvania, &c., wherein the said duke transferreth his right and title to Newcastle, and 12 miles circle about the same, with all powers, and jurisdictions, and services thereunto belonging, unto the said William Penn, and having seen by the said duke's appointed attorneys, John Moll and Ephraim Herman, both of Newcastle, possession given, and by our governor, William Penn, esq., possession taken, whereby we are made subjects, under the king, to the said William Penn, esq., we do hereby, in the presence of God, solemnly promise to yield to him all just obedience, and to live quietly and peaceably under his government. Witness our hands, this 28th day of October, Annoq. 1682. [Then follow several signatures.] Recorded at Philadelphia, 28th 8mo., 1701.

4. The following document:

NEWCASTLE, *the 28th October*, 1682.

Memorandum that, the day and year first above written, William Penn, esq., by virtue of an instrument of indenture, signed and sealed by his royal highness, James, Duke of York, &c., did then and there demand possession and seizen of John Moll, esq., and Ephraim Herman, gentleman, (attorneys constituted by his royal highness,) of the town of Newcastle, otherwise called Delaware, with 12 miles circle and compass of the said town; that the possession and seizen was accordingly given by the said attorneys to the said William Penn according to the usual form, by delivery of the fort of the said town, and leaving the said William Penn in quiet and peaceable possession thereof, and also by the delivery of turf and twig, and *water and fowle of the river Delaware*, and that the said William Penn remained in the peaceable possession of the premises, as witness our hands and seals the day above said, and when the words and *water and soyle of the river Delaware* were interlined before us. [Here follow several names.]

5. The following document:

A certificate, or declaration, signed by 12 persons, as "witness our hands *in* Delaware river," this 7th day of November, 1682, and recorded at Philadelphia, 28th of 8th month, 1701. It recites and refers to the duke of York's deed of August 24, 1682, as having authorized Moll & Herman to deliver possession to Penn, "of all that part of Delaware river and bay from twelve miles distance from the town of Newcastle, downwards, as far as Cape Henlopen," which the duke had granted to Penn on conditions. It recites that Penn, by letter of attorney, dated 28th October, had appointed Captain Wm. Markham his attorney, to demand and receive of Moll & Herman, attorneys of the duke, "the delivery and possession of all the said tract of land upon Delaware river and bay, beginning 12 miles south of Newcastle, and extending south to the Whore-

kills." And then testifys and declares, that on the day of the date the signers had been present, and seen Moll & Herman give and deliver, in the duke's behalf, actual possession to Captain Markham, to Penn's use, of the land, soyle, and premises in the said instrument of indenture mentioned, and according to the true intent of his R. H., mentioned in the same. A note states that the word soyle was interlined prior to signing.

6. The following document, *a certification from John Moll.*— It states that Penn, on his first arrival from England, by Newcastle, upon the Delaware river, October, 1682, sent a messenger ashore to give notice to the commissioners that he desired to speak to them aboard; that Moll, who had been left by Sir Edmond Andros, governor general, under his royal highness, the first in commission, went aboard with some more of ye commissioners, *when Penn showed them two indentures, or deeds of feoffment, from under the duke's hand and seal, dated 28th of August*, 1682; *one for the county of Newcastle, with* 12 *miles distance north and south thereunto belonging;* and the other beginning 12 miles below Newcastle, and extending south unto Cape Henlopen, *together with* the mills and *waters of the said river, bay, and rivulet, and the islands thereunto belonging and underneath;" to which indentures were added, powers of attorney to him, Moll, and Herman, dec'd, &c. &c.;* that Herman happened to be gone from home, and so was not aboard the ship with Moll; *that he, Moll, desired from Penn* 24 *hours' consideration for to communicate with Herman and the rest of the comm'rs about the premises.* In which compass of time, *all unanimously agreed to comply with his royal highness's orders.* Whereupon, they "did give and surrender, in the name of his royal highness, unto him, the said William Penn, esquire, actual and peaceable possession of the fort of Newcastle, by giving him the key thereof to lock upon himself alone the door; which, being opened by him again, we did deliver also unto him one turf, with a twigg upon it, a *porrenger with river water and soyle in part of all what was specified in the said indenture, &c., &c.;* that, a few days after, they went to the house of Edmund Caulwell, at the south side of Appoquenenning creek, by computation above 12 miles distance from the town of Newcastle, as being a part of the lower counties there above mentioned in his royal highness's other deed. And, after they had shown unto the comm'rs of these counties, the powers and orders given unto us as aforesaid, we asked them—the certificate proceeds to state—whether they could show any cause why we should not do there as we had done at Newcastle. And, finding no manner of obstruction, the same manner and form of delivery was made there as had been made at Newcastle, "*which acting of us was fully accepted and well approved of by Anthony Brockhold, then commander-in-chief, and his council at New York, as appears by their declaration, bearing date the* 21*st of November*, 1682, *from which jurisdiction we had our dependance all along ever since the conquest, until we had made the above related delivery unto Governor William Penn, by virtue of his royal highness's orders and commands, &c.*

JOHN MOLL.

Mr. Clayton: The United States here close their *paper title.*

Mr. Eaton offers Senate document, vol. III., 1837–'38, document No. 140. Mr. Bayard objecting to the reception of the document by itself, Mr. Eaton offers a former contract of submission, which he argued was abrogated but in part by the submission in this case.

This document contained a copy of Judge Baldwin's opinion in a suit between the same parties, it was said, and some argument arose as to the effect of this former suit. Gov. Bibb argued on this subject, citing: 11 St. Trials, 261; 2 Bur., 666; 2 Doug., 421; note, 159 *a* 6 term, 609; 2 Bur., 658; Com. Dig. Ev. A, 5; Hard, 472; Gilbert on Ev., 35, 36, 37; 1 Ld. Raymond, 730; Com. Dig. Ev., A, 5; 12 Ven. Ev. Eject. T, B, 35; S. Mod., 142.

Mr. Arbitrator gave an opinion explaining his views, and sustaining the conclusions of his mind on the subject; which was to reject the evidence.

"The grants, concessions, and original constitutions of the province of New Jersey," &c. By Aaron Leaming and Jacob Spicer, Philadelphia; W. Bradford, printer to the king's most excellent Majesty, for the province of New Jersey.

Page 3 and 4: Whereas King Charles II., by patent, 12th March, 1663–'64, for consideration therein mentioned, did give and grant unto his brother, the duke of York, in fee "all that part of the main land of New England beginning at a certain place called or known by the name of St. Croix, next adjoining to New Scotland in America, and from thence extending along the sea coast unto a certain place called Petuaguine or Pemaquid, and so up the river thereof to the farthest head of the same as it tendeth northward, and extending from thence, &c., &c., &c.; all that island or islands, commonly known by the name or names of Matowacks or Long island, scituate, lying, and being towards the west of Cape Cod and the Narrow Higansetts, abutting upon the main land between the two rivers there called or known by the several names of Connecticut or Hudson river, *together, also, with the said river, called Hudson river*, and all the lands *from the west side of Connecticut to the east side of Delaware bay.* And, also, all those several islands called or known by the names of Martin's Vineyard and Nantuckes, or otherwise Nantucked; together with all the *lands, islands, soiles, rivers, harbours, mines*, minerals, quarries, woods, marshes, lakes, *fishings, hawkings, huntings, and fowling, and all other royalties, profits, commodities, and heredetaments to the said several islands, lands, and premises, belonging and appertaining, with their and every of their appurtenances; and all our estate, right, title, interest, benefit, advantage, claim, and demand of, in, or to the said lands and premises, or any part or parcel thereof;* and the reversion and reversions, remainder and remainders, together with the yearly and other the rents, revenues, and profits of all and singular the said premises, and of every part and parcel thereof." The patent also grants (p. 5) *powers of government in extenso*, "as well in all causes and matters, capital and criminal, as civil, *both marine and others*," subject to an appeal; to make and to execute or abrogate laws, "not only within the precincts of the said territories or

islands, *but also upon the seas, in going and coming to and upon the same*," "for the good of the adventurers and inhabitants there; to *admit persons to trade and trafique unto and within the said territories and islands aforesaid;* to expel by arms, as *well by sea as by land*, certain persons," &c. The objects of the charter being, obviously, for colonization, plantations, and settlement.

Same book, page 8, &c. Lease and release; the lease dated June 23, 1664, and the release dated June 24, 1664. The duke of York to John, Lord Berkely, and Sir Geo. Carteret. Recites the king's grant to the duke, of March 12, 1663–4. And grants to Berkely and Carteret in fee, "all that tract of land adjacent to New England, and lying and being to the westward of Long island and Manhitas island, and bounded on the east by the main sea, and part by Hudson's river, and *hath upon the West Delaware bay or river, and extending southward* to the main ocean, as far as the Cape May at the mouth of Delaware bay; and to the northward as far as the northernmost branch of the said bay or river of Delaware, &c.; and crosseth over thence in a straight line to Hudson's river, &c.; and, also, all *rivers, &c., fishings, &c.*, fowling and *all other royalties, profits, commodities, and hereditaments, &c.*, with their, *and every of their appurtenances, in as full and ample a manner as the duke himself held them.*

Same book, page 12. *The concession and agreement of the lords, proprietors of the province of New Coesarea, &c.*, saying that *the register shall enter all grants of lands from the lords to the planters*, and that the *surveyor general or his deputy shall survey all such lands as shall be granted by the lords, &c.*

Same book, page 41. The king, Charles II, by letters patent, dated June 29, 1674, grants to the duke of York, the State of New Jersey, in the same manner and by the same description as he had granted it March 12, 1663–4. This second grant was recorded November 4, 1674.

Same book, page 46. The duke of York, by deed, dated July 29, 1674, grants to Sir George Carteret, (after reciting in its language nearly, the king's grant of July 29, 1674,) his heirs and assigns, forever, "all that tract of land adjacent to New England, and lying and being to the westward of Long Island and Manhitas island, and bounded on the east part by the main sea, and part by Hudson's river, and extends southward as far as a certain creek called Barnagatt; being about the middle between Sandy Points and Cape May; and bounded on the west in a straight line from the said creek called Barnagatt, to a certain creek in Delaware river, next adjoining to and below a certain creek in Delaware river called Kenkokuskill; and from thence up the said Delaware river to the northernmost branch thereof," &c. And, also, all rivers, &c., fishings, &c., and all royalties, profits, commodities, and hereditaments, to the said lands belonging.

Same book, page 49. King Charles II, by letters which seem to be addressed to the magistrates in New Jersey, referring to certain troubles which had been caused by ill affected persons, recites that Sir Geo. Carteret, "by grant derived under us, is seized of the pro-

vince of New Coeserea, or New Jersey, in America, and the jurisdiction thereof as proprietors of the same." These letters are dated June 13, 1674.

Same book, page 50. Some directions, instructions, and orders by Sir Geo. Carteret, dated apparently July 31, 1674, and some declaration explanatory of the articles of concessions made by him.

Same book, page 61, a quintiparte deed, dated July 1, 1676, between Sir George Carteret, of the first part; William Penn, of the second part; Gawn Lawry, of the third part; Nicholas Lucas, of the 4th part, and Edward Billing, of the fifth part. It recites, essentially, in their own words, of grant and boundary, the king's grant of March 12, 1663–64, to the duke of York; the duke's grant by lease and release of the 23d and 24th of June, 1664, to Berkely and Carteret; and then divides the State into east and west Jersey, the western boundary of the whole State not being disturbed. It assigns east Jersey to Cartaret, and west Jersey to Penn, Lawry, Lucas and Billing.

Adjourned till to-morrow at same place, 10 o'clock.

October 30, 1847.

Met pursuant to adjournment. Present: the counsel, as before.

Mr. Bibb puts in evidence a chart of Delaware river, from Bombay Hook to Ridley creek, with soundings, &c., taken by Lieutenant Knight, of the navy, composed and published for the use of pilotage by J. F. W. Des Barnes, esq., June 1, 1779. This map is an English map, and was made apparently from soundings, &c., taken while ye British fleet was in Delaware river, in November, 1777. It was cut out of a large book of maps at Washington, in the department of the coast survey. On this map *the only channel marked is on the west side of the Pea Patch. The east side is marked in small dots, indicative of shoals, but the soundings are not given.*

It is received subject to all exceptions.

A chart or survey of Delaware river, between Newcastle and Port Penn, under the direction of Captain W. G. Williams, United States topographical engineers; drawn by Lieutenants Drayton, Sill and Reed, United States army, 1834.

This was an original map, on a large scale, and was received subject to all exceptions. It came from the Department of State at Washington.

Mr. Bibb: Leaming and Spicer's laws of New Jersey, page 412. A deed, August 6, 1680, from the duke of York to William Penn, Gawn Lawry, Nicholas Lucas, John Eldridge, Edmund Warner and Edward Byllynge. It recites that the king had granted, March 12, 1663–4, among other things, to ye duke, in fee, a tract of land to be called New Jersey, which he "*hath upon the west Delaware bay or river;*" that the duke had granted the same tract to Berkely and Cartaret; that Berkely had conveyed his part to John Feninck in trust for Edward Byllynge; and so tracing title to the grantees or

confirmees, describing in one part of the deed a grant of west Jersey, page 414, as extending southward and westward *along the sea coast and the before mentioned bay or river*, (called Delaware river and bay;) confirms the moiety of Berkely to Penn and others, with all *islands, bays, rivers, forts, waters, royalties, franchises and appurtenances whatsoever to the same, belonging or in any way appertaining;* as also the *free use* of all *bays, rivers and waters leading into or lying between the said premises, or any part of them, in the said parts of America, for navigation, free trade, fishing or otherwise; and all powers of government as fully as the king had granted them to the duke.* It is declared that these several powers and authorities were given and granted to the duke and his assigns, "*for planting, peopling and improving*" of the lands, places and territories thereby granted, and for transporting thither subjects, &c., as also *for defending, guarding and keeping the same.*

Mr. Clayton now reads (the other side agreeing that they shall be read as evidence) two letters from Wilson M. C. Fairfax, of the United States coast survey; one to Professor A. D. Bache, superintendent United States coast survey, dated office of the coast survey, Washington, September 10, 1847, as follows:

"In response to yours of September 3d, I have the honor to state the answers, below appended, to your general queries, viz:

"If a line were drawn midway between the shores of the river Delaware, near the Pea Patch, how would it pass in reference to the Pea Patch island? I answer: It will pass through the Pea Patch island, 46 yards northeast of the southwest extremity of the wharf at the lower end of the island, which projects towards the Delaware shore; and 20 yards eastward of the middle point of the upper end of the island.

What are the several distances of north and south extremities of the midline of the Pea Patch island from the Delaware and New Jersey shores? I reply: That the midline of the island will be at its northern extremity 2,090 yards from the Delaware shore, and 2,130 yards from the Jersey shore; and the southern extremity, the midline of the island will be 2,197 yards from the Delaware shore, and 1,875 yards from the Jersey shore.

What is the length of the island in yards; what its breadth; and what its area? Answer. Its length is 1,083 yards; its average breadth 461 yards; its area 87.60 acres.

And the other letter from the same person to the Hon. John M. Clayton, dated office of the coast survey, Washington, September 29, 1847, as follows:

"I have this morning received, from Professor Bache, directions to reply to your letters of the 14th and 16th September, 1847, which I will now do.

"1. *What is the area of that part of the island on the Delaware side of the middle line of the river Delaware, and what is the area of that part of the New Jersey side of that line?*

Answer. The middle line of the river throws *twenty-one and*

nine-tenths acres of the *Delaware side*, and *sixty-five and seven-tenths acres to the New Jersey side.*

"2. What is *the main and deepest channel of the river opposite to the island?* Is it not on the Jersey side? *What is the greatest and what is the average depth of the Jersey and of the Delaware channel?* What is, in truth, *the main channel of the river at this point?* Answer. The *main and deepest channel of the Delaware river, opposite the Pea Patch, is on the Jersey side. The greatest depth of water in the channel on the Jersey side is* 40 *feet, and on the Delaware side* 25 *feet. The average depth of water in the channel of the Jersey side is* 32 *feet, and on the Delaware side* 23 *feet.* But, to take the centre channel on either side of the island, no vessel drawing more than 19 feet water, at low water of spring tide, can pass through. *The Jersey channel is the shortest and widest*, and both about equally curved."

This letter goes on to say that the distance from the centre of the Pea Patch island, and from each extremity to the spire of that town, which was made a triangulation point, is as follows:

From	the centre	of the Pea Patch	to New Castle	spire, 4.83 m.
do	upper end	do	do	4.61 m.
do	lower end	do	do	4.98 m.

Adjourned until Tuesday, November 9, in this place, at 10 o'clock, a. m. When all the counsel are again present as before.

The return of James C. Mansfield, esq., to the commission issued to him October 13, 1847, (see ante,) is made, and the same was opened by the clerk.

Mr. Bayard puts, in evidence, "Votes and proceedings of the House of Representatives of the province of Pennsylvania, beginning the 4th day of December, 1682, vol. 1, Philadelphia, Franklin & Hall, 1772." He cites at pp 168, 169, and 170, for the purpose of showing that the State of Delaware did always claim and exercise jurisdiction over the bay and river east of it.

"The petition of several of the merchants and inhabitants of the city of Philadelphia, on the behalf of themselves and all others inhabiting in and trading to the said province." The petition is addressed to the general assembly. It sets forth the grant to Penn of Pennsylvania; the right of free passage over all harbors, bays, waters, rivers, and posts, up to the said State, and out of it; that, by the charter to Penn, the king had declared that no tax should be set upon any merchandise to be loaded or unloaded in the said ports, unless with the assent of the assembly here, or act of Parliament in England; that, notwithstanding this, *the governor had passed a law at* New Castle imposing *a tax, for the support of the New Castle fort*, upon all vessels of a certain class coming up to Philadelphia. Praying redress, &c. This petition is dated 3 Mo 8, 1707.

Following this petition of the merchants to the assembly, is the petition of the assembly to the governor, complaining of the same

exercise of jurisdiction by the State of Delaware; but so far as appeared in the proceedings quoted, the right had never been disavowed by the State of Delaware, though, as was said by Mr. Bayard, there were many circumstances or complaints against it.

Mr. Bayard cites laws of the State of Delaware, volume 1, page 567, "An act for the more effectual ascertaining and fixing the limits of the several counties within this government," &c., passed Septem. 4, 1775. It recites the articles of agreement between Penn and Baltimore, the decrees of Lord Hardwick upon them, and that the lines of boundary so fixed and settled had been run by commissioners, and marked. It recites further, 82, that in 1767, *a joint petition was made to his present majesty by Penn* and Baltimore, reciting the articles and decrees, &c.; in which petition they "*prayed his majesty, that he would be most graciously pleased to give his royal allowance, ratification, and confirmation of the several and respective articles and enrolled decrees, before mentioned, and every article, clause, and thing in them and each of them contained, and that the same might be forever established between them; whereupon his majesty, by his order in council, dated January* 11, 1769, *was pleased to signify his royal approbation of the said agreement and proceedings mentioned in the petition of the said proprietaries, as all others whom it might concern, were ordered to take notice and govern themselves accordingly.*" It recites further, 83, that the honorable the governor, &c., of Pennsylvania and the lower counties, had, *in pursuance to his majesty's pleasure and permission*, by proclamation, 8th April, 1775, made known the premises, &c., &c. Then proceeds to establish the boundaries.

Mr. Bibb cites 1st Chalmer's Opinions, p. 39, "on the king's right to the three lower counties on the Delaware, by the A. G. and S. G., Mathy and Thompson." It appears by this opinion, dated October 21, 1717, that "*ye earl of Sutherland applied to ye king for a grant of a charter of certain lands lying upon Delaware bay, in America, commonly called the three lower counties, which, he represents, he is ready to prove, do belong to ye crown.*" It is obvious that, in this opinion, which is too long to transcribe here, *the earl made no mention to the attorney and solicitor general of the charter of* 22, *March*, 1682–'3, *to the duke of York, now produced in original here before the arbitrator. No suggestion whatsoever is made of such a paper; no express opinion is given as to the goodness or badness of Mr. Penn's title upon the facts as then apparent;* and the document thus concludes: "On the whole matter we humbly submit it to your majesty's consideration, *whether it will not be reasonable that your majesty's title should be established by the court of chancery, before any grant should be made of the premises;* and, if any grant should be made, we most humbly submit it to your majesty whether the claims of purchasers or grantees under Mr. Penn, who have improved part of the said three lower counties, should not be established; *but if Mr. Penn should have a title to the said three lower counties, by virtue of the two grants made to him by the late King James, in* 1682, when duke of York, we have not received any answer why he should not account, &c."

Cites same book, p. 189: "The opinion of Chief justice Morris, in New Jersey; on ye king's power of mercy." No date.

Cites the 2d map, in Mr. Penn's big paper book, (produced by the United States,) to show that the 12 *miles' circle came only to the west edge of the Delaware.*

Leaming & Spicer's laws of New Jersey, page 390, chapter vi., in the concessions and agreements signed by one hundred and fifty-one of the proprietors and freeholders, on the 3d March, 1676, "*convenient portions* of lands *are granted for wharves, quays and harbors,*" and also that the inhabitants have "*free passage through or by any seas, bounds, creeks, rivers, rivulets, in the said province, through or by which they must necessarily pass to come from the main ocean to any part of the province aforesaid.*"

Also same book, page 409, chapter xliv., where power is given to the assembly "within the said province *to direct and appoint places* for such and so many towns, cities, *ports, harbors, creeks and other places for the convenient loading and unloading of goods and merchandise out of ships, boats, and other vessels, as shall be expedient.*"

Same book, page 436, to show that in February, 1681, the commissioners chosen for settling and regulating lands within the province prescribe that "*the surveyor shall measure the front of the river Delaware, beginning at St. Pink creek, and from thence down to Cape May,*" and that each tenth, or ten proprietors, shall have the proportion of *front to the river Delaware*, and so far back into the woods as will make or contain 64,000 acres.

Same book, page 480, to show that on the 8th or 7th month, 1683, it was enacted by the general assembly of West Jersey, "that the proprietary, &c., of the province of Pennsylvania be treated with in reference to the *rights and privileges of this province to or in the river Delaware.*"

Same book, page 519, to show that the same assembly, in October, 1693, passed a law reciting that the whale fishery *on Delaware bay* had been in so great a measure invaded by strangers and foreigners, that the greatest part of the oyle and bone recovered and got by that employ hath been exported *out of the province*, to the great detriment thereof; and enacting "*that all the persons not residing within the precincts of this province or the province of Pennsylvania, who shall kill or bring on shore any whale or whales within the Delaware bay, or elsewhere within the boundaries of this government, shall pay one full and entire tenth of all the oyle and bone made out of the said whale or whales unto the present governor of this province for the time being.*"

Mr. Clayton reads from the laws of the State of Delaware, published in 1829, and already in evidence, page 274, "An act for the preservation of certain shell fisheries within this State," passed February 12, 1812. This act enacts that no person not residing "*within this State*" shall take or gather oysters, &c., "*within the same,*" except on conditions, and prescribes mode of proceeding for violation of the act.

Same book, pages 275–6. An act passed February 12, 1829, to

regulate the use of gill nets or gill seines in the river Delaware, to impose a tax thereon, and to provide for the payment of the same. It enacts, section 1, that no person "shall place or use *in the river Delaware, within the limits and jurisdiction of this State*," &c. Sections 2 and 3 speak of using nets "*in the river Delaware.*"

Mr. Clayton reads from "Laws of the State of Delaware," Newcastle, 1797, already in evidence, page 44 of the appendix, the acceptance of Penn's charter of privileges, October 28, 1701, and papers therewith connected.

Mr. Bayard reads from "Laws of the government of Newcastle, Kent, and Sussex upon Delaware," Philadelphia, 1752, already in evidence, at pages 135–37, an enactment that if any convict or pauper "*shall be imported into the river Delaware after the publication of this act, and shall be found within this government at any time within the space of twelve months next after their being so imported as aforesaid, whether such persons were landed within this government or elsewhere*," &c. And in a subsequent part of the same page speaks of them as "imported into this government, and put on shore, or permitted to go on shore, by such master or merchant, *in any other government upon the river Delaware, or upon any island or place within the said river.*" This act is 13th Geo. II.

Same book, pages 146–7. An enactment for prevention of the danger that may arise by piloting into the bay and river Delaware, the ships of enemies and pirates, which enacts "*that no person or persons who are or shall be pilots within the bay or river aforesaid, shall presume to go on board any inward bound vessels without the license of the governor for the time being first had and obtained*," &c. This act is also 13th Geo. II.

Mr. Bayard puts in evidence a very ancient paper, purporting to be an original patent. It reads: Sr. Edmund Andros, Knt. seigneur of Sausmarer, lieutenant and governor general under his royal highness, James, duke of York and Albany, &c., of all his territories in America. Whereas, there is a certain parcel of land in Delaware bay lying and being in a neck called Kickout neck, divided by the Whorekill neck by a small creek, that goes by the name of Potskit creek, the which hath been laid out for Anthony Inlos, by the approbation of the court at Whorekill, and is certified to be already seated; the said land beginning at a marked white oak, dividing it from the land of Alexander Motesteyn, from thence running southeast, southerly one hundred and fifty perches, to a marked white oak, standing by the marsh, and from thence, with a line drawn west three hundred and fifty-five perches, to a marked poplar, being the bounded tree of the said Alexander Motesteyn, and from thence, with a line drawn northeast 325 perches to the first bounded tree, being the dividing line between the said Anthony Inlos and Alexander Molesteyn, containing one hundred and fifty acres of land, as by the return of the survey doth and may appear. Know ye, that by virtue of his Majesty's letters patents, and the commission and authority derived unto me under his royal highness, I have given and granted, and by these presents

do hereby give and grant unto Anthony Inlos, his heirs and assigns, the aforesaid parcel of land and premises, with all and singular the appurtenances, to have and to hold the said parcel of land and premises unto the said Anthony Inlos, his heirs and assigns, unto the proper use and behoof of him, the said Anthony Inlos, his heirs and assigns forever. He making improvement thereon according to law, and yielding and paying therefor yearly and every year, unto his Majesty's use, as a quit rent, one bushel of good winter wheat, unto such officer or officers as shall be empowered to receive the same, at the Whorekill. Given under my hand, and sealed with the seal of the province, in New York, the 20th day of August, in the 31st year of his Majesty's reigne, Annno q. Dominy 1679.

ANDROSS.

Examined by me.

MATHIAS NICHOLLS, Senior.

Below: "This patent land and premises was assigned and acknowledged in open court the 14th day of June, 1681, by the above-named Anthony Enlos, to John Kipharen. Test: William Clark, jr., clerk."

Endorsed: "A patent unto Anthony Inlos, for land in Delaware bay, No. 478—No. 30, John Hughes—No. 30, Richard Peters."

Benjamin Guscoin, a witness of J. Humphreys, having been duly affirmed by the Mayor of Philadelphia, says: I live in Salem; have known the Pea Patch about fifty-nine or sixty years. When I first remembered it, it would be covered at half-tide. At that time it was much nearer to the Jersey than to the Delaware shore. Since that time the Jersey shore has lost very much. When I first knew it, the larger class of vessels were in the habit of passing on the west side. I never took notice of a square-rigged vessel coming on Jersey shore. It is difficult to say how much the Jersey shore has been washed away. Opposite to the Pea Patch, not less than 150 yards; about that, perhaps; I merely guess. The tides act irregularly. I have known the tide in one year to take away six feet of solid bank; then there may not be such another tide for several years. The tenant on the farm below me, told me that for nine years it averaged about a corn-row every year; that is, four or five feet. When I first knew the island, certainly it was considered nearest the Jersey shore. I never saw it measured. It looked nearer to New Jersey. Sometime ago, I was for about nine years, and am now, also, one of the managers of New Jersey, having charge of river bank, on which account my attention was directed to the subject.

I have seen Dr. Gale several times on this island, exercising acts of ownership, and been with him; this was the spring before the soldiers went there; probably, spring of 1814; they took possession in fall. Dr. Gale had a fishery on the island. He was part of one summer clearing rubbish and impediments. I saw him make several hauls. It was not a good fishery. The current swung his net round into deep water, and the fish went below. He caught

some good shad. The first I ever heard of the State of Delaware's claiming the island, was when the soldiers took possession. When I first saw the island, there were appearances which made me suppose the island was originally connected with the main shore on the Jersey side; that was my impression from what I took up from old people.

The old men whom I knew, as a boy, are dead. I don't know of cattle being driven across from the Jersey shore to the island. There was nothing for them to get on the island. I don't think that I ever heard old men say that they knew of cattle being driven across, or had forded across from Fenn's point. I lived at lower Penn's neck upwards of twenty years; I lived there twice. I went there in 1800, and staid till 1813; then moved to Ellsensboro', not much further; it is right on the bank of the river. The island was in view of my residence ever since I first knew it. I knew Morris Hall very well, and also Joseph B. Brown: both are dead. I know where the burnt house was; burnt in 1777 or 1778 by the British. The well which was then in front of the house is now in the river, 150 yards from shore. At a very, an uncommon, low tide you can see the traces of it, bricks, &c.

I was present when Dr. Gale was driven off his property. I was born July, 1776, and was about thirteen when I first saw the Pea Patch. I lived about a mile from Salem; was frequently before that time at Penn's neck. Perhaps I have seen the Pea Patch before I was eleven years old. I think I was first on the island in 1801–'2. A great many of us went to drive off crows; they went from both States. I was there two or three nights. I went there afterwards, when Dr. Gale was there. I think, in 1812, he was there a good deal of the season. I saw him there. I was at work at Finn's point. I think I can say it was the same year Gale was there that the soldiers came there. I think it was in the year 1813 that he cleared it, but am not sure whether it was 1812 or 1813. The soldiers came in the fall after he fished there. I was over there several times when Dr. Gales was fishing there. Can't tell how many times, but several; he had a good many men. He did not ever embank the island according to my knowledge. In 1813, when he came there, a tide fuller than common overflowed it; such a tide, for example, as we had October a year ago; a very full tide. It was a small frame house he put up there, big enough to hold twenty or twenty-five men: a small one story, rough-boarded house, weather-boarded; materials brought there; one room, perhaps, 15 by 18 feet. It was built, I presume, for a fisherman's hut. I saw no other building. This must have been put up for a fisherman's hut; but was put up by a workman, I should suppose; brought there and put up. The person who came there with the soldiers was named Captain Drummond; he had a sword by his side. I don't remember seeing others in military dress.

By Mr. Sargeant. I think that ever since I remember, light vessels, at the top of the tide, went through the east channel. Small vessels would often come in there for a harbor. It was very common. I remember once twenty-five coming in. The rise and

fall of the tide is about six feet. At low water you might walk three hundred yards off this bank.

Adjourned until to-morrow, November 10th, at 10 o'clock; when, present as before.

William Schellinger, a witness of the United States, having been sworn by Mr. Alderman Griscom, says: I am 57; served my time to Delaware pilots; am a regular Delaware pilot; got my third-rate branch, or certificate from wardens in 1817; have piloted a great many ships and brigs up and down this river. I was first on island with Captain Clark, of the topographical engineers, in 1813 or '14; first boat that landed in behalf of the United States. I had known the island since a boy. I had been anchor sweeping, to the east, with Thomas Tarrent. I remember lying at Reedy island aboard pilot-boat, when a number of gentlemen came from Penn's Point to scare off crows. I must have known the island as far back as 1801, or 1802. When I first went on it there was no house there of any sort; it was very soft mud. Captain Clark, of himself, ran a pole down, 18 feet; no embankment, nothing of the sort. This was in 1813, the first time I landed with Captain Clark. They do now use the western channel. When I was anchor sweeping there, before the war, during the embargo, there was then seven fathom water, and is now; bottom foul. Abreast of island, water is deepest on the eastern side, and was so before the war. There never was a time, in my knowledge, that ships could not go through on the eastern side. I have navigated many ships through there. In 1837, 1838, and 1839, I have towed ships drawing 17 or 18 feet. For four or five years I have been engaged for Havre de Grace towboat company. See the island frequently. It is exclusively a mud formation. The Jersey shore is sand, and the eastern channel is hard. From the mud formation of the island, I should suppose it had been formed by the Delaware shore. There are other places very similar; Cherry island, and a ridge near New Castle, above Delaware city. The channel to the east was not known before the war as well as now. It was frequented by vessels going to the Pea Patch. I dont say by square rigged vessels. The United States companies, one white, one black, hove up bank, frozen ground on the island, but it sunk with thaw. In February they sent me down to Lewistown, with letter to commanding officer, informing him of peace. There is a shoal near Christina creek which will, in time, it is likely become several islands. Several islands have been made in my memory; one below Chester, which now has grass on it.

It is my mere supposition that the Pea Patch is formed upon the Delaware side. Mud, I think, is not brought so far down the river. There is a cove. I know Finn's Point; it is sand. That shore is sand. I can't say how it is 30 yards from shore. There is a bulkhead bar above the Pea Patch, and between it and the Pea Patch used to be water for 20 feet vessels. Not so much now; vessels frequent the western channel. When I was raking, I found a deep hole abreast of the Pea Patch; seven fathom. I can't say how was on Delaware side. It was mud; I did not sweep it. It has

been safe, at all times, to take vessels on Delaware side; no difficulty whatever. I had vessels not drawing more that 9 feet. I know where Salem creek is; it is below Pea Patch, perhaps two miles below, [note that, Bibb says,] not so much perhaps. When I used to navigate square-rigged vessels through the east channel, we went up at any tide, high or low. Ever since my remembrance there was a bulkhead bar above the coast, and a small channel, very narrow, between it and the Jersey shore. I never saw a vessel beat through there, before 1813. Within last four years I have seen light colliers and Boston packets, drawing about nine feet, go through on flood tide. The tide rises and falls 6 feet.

I don't know General Bloomfield. I believe I once saw him at Fort Mifflin with Commodore Rogers. We did not leave any body on the island in 1813; there was nothing on which they could have lived. We hauled vessels down. I can't say if it was 1813 or 1814; did not charge my memory. I had been froze up there for 3 or 4 weeks; had to come for water to New Castle. The soldiers landed directly after the government took possession of the Pea Patch. I did not stay all the time from the day they ran the pole down the mud. I don't know that I ever saw Dr. Gale. I saw no fishing house, nor shanty, nor shed, from 1813, when we landed there; they afterwards built one. I never saw Dr. Gale claiming the island or fishing there. I have seen, more than 12 years ago, a square rigged vessel on the Jersey shore. I myself piloted the ship Augusta, 13 or 14 years ago, 350 to 400 tons, through there on a flood tide. In 1817 or 1818, I piloted small ships through of $11\frac{1}{2}$ to $12\frac{1}{2}$ feet, not so much sometimes, when coming from Charleston light with cotton. Before 1812, don't remember ever piloting any sea vessel, but one, through there, a small topsail schooner, draft between 6 and 8 feet. Came through in 1819–'20 or '21, or about there, in Langdon Cheves and Wade Hampton, draught, when loaded, about $12\frac{1}{2}$ feet.

Re-examined by Mr. Bayard.

When I went with Mr. Clark and ran pole, we remained pretty much all day; he was surveying. There was no habitation of any sort on island. Vessels were towed down to live in. After that, they established a little schooner, "The Adventure," which ran down regularly. I went down, off and on, through the season.

By Mr. Clayton.

I have never been on Goose island. There is grass on it. The channel is on the east side. We used to tow vessels of 20 feet between the bulkhead and island; not so now. If I had now to bring up the Pennsylvania with armament, I should bring her on the *west* side. I do not think she could now come through on the east side nor on the west without towing. It is wider on the east side. On the west side it is a small narrow drain. The west channel is nearer the Delaware shore. More water immediately

abreast of the Pea Patch on the east side than on the west, more volume.

Persons, soldiers, came with crow scalps over to Delaware. When I went on, there was no living thing on the island but crows and muskrats. I cannot say whether it was the spring of 1813 or 1814 that I was there; one or the other.

Re-cross-examination.

The bulkhead bar—the lowest, shoalest part of it—as near as I can guess, may be about 3 miles above the north point of the Pea Patch. Good working channel down to New Castle. Below New Castle, it is a bar which prevents beating ships of 17 or 18 feet. Near New Castle, it is shoal at this day.

We had a chain to survey the Pea Patch when I was with Captain Clark. I think he said he surveyed 30 acres for a fort. Island might have had forty acres. Goose island is uninhabited; by which I mean there is no population nor houses on it, nor cattle. No pasturage there; sometimes overflowed.

By Mr. Sergeant.

The channel between bulkhead and Pea Patch is become more shallow; there is a sort of channel above the bulkhead and the Jersey shore. What channel there is, is there. You now go by western channel. Going now from New Castle down the western channel, you go between buoy and bulkhead.

When we drove crows away from Pea Patch, we did not land; shot them from boats. When I first got my branch, there were no charts.

John White, witness of Mr. Humphrey, having been sworn by the Hon. Justice Sharwood, says: I am not a pilot. I have been acquainted with chart of Delaware river since 1807. Since that time, the western channel has been considered as the main navigable channel. I have not been in the river business for 10 years, and don't know what shoals have occurred there within 10 years. I became acquainted with the river by following the river trade on vessels of 60 or 70 tons. Since 1807, I have seen vessels worked through the east channel in fair wind; and, since the war, I have seen the Charleston packets, of which Mr. Schellinger spoke, go through. Whether they go up or down, they must have a fair wind and not have to beat for it. Measuring by the eye, I should suppose that the Jersey shore was nearest to upper end of island than the Delaware shore. The western has always been called the main navigating channel. It was so called even when I was a boy, and before I knew anything of the river business. Whenever there was any difficulty, *it* was always preferred with me; I speak of 10 years ago.

Since I have known it the west was the broadest and deepest channel. Mr. Schel'r has said that on the east side opposite the

Pea Patch is deepest, but that is a hole. I should think that from the upper end of the island into Dragon cove, must be 3 miles. I went in 1807 in my own vessel; I have never navigated vessels of more than from 7 to 9 feet water, nor square rigged vessel. I traded from Cohaney creek to Philadelphia, all along shore; stopped at Salem. I ceased nine years ago last August; continued my business during all the war. *I* always went in the east channel, unless wind obliged me to go the ship channel. The ship channel is on the west side, and always has been, and always will be; for ages it has been so. I have seen *small* ships, with fair wind, go through the east. There were then navigating the Delaware much larger vessels than those of which I now speak, as large then, generally speaking, as now. The Woodrop Sims was as large. In the west channel, part of bottom is hard, and part soft; abreast of Pea Patch, hardest on Jersey side. I don't know if large vessels could beat through the east channel; I never saw one do it; they might be able possibly to do it in my time; narrow work, head scraping, to get through.

Liverpool packets are large vessels; I never saw them go on west, always went on east. *All* large vessels went on that side; they went through safely, vessels of 400 tons; India vessels with cargo.

Re-cross-examined.

The persons who navigate small vessels are usually good pilots. I resided at Cohaney 30 years, there and there abouts. I moved here in August, 1838. I should think navigators of small vessels must be good pilots, for they must know the smaller channels as well as deep.

Michael Lewis, a witness of J. Humphrey, having sworn by Mr. Justice Sharwood, says : I was a pilot on this river many years ago; I am now 83; I have known the channel 40 years. Then, and since, the west channel has been considered the main ship channel; I think the Pea Patch is about the middle of the river, perhaps, nearest the Jersey shore; I have seen square-rigged vessels pass on both sides, but to pass on east, they required fair wind. A small one might beat through, but it would have to be a small one; the width would allow no other; always within my knowledge the west has been considered the main ship channel. I reside in Philadelphia, and almost forget when I became a pilot, it is so long ago. During the war time I went to sea, and was taken prisoner; I was a pilot for about 40 years; I have not acted much as a pilot since the war; square-rigged vessels went on both sides of the Pea Patch at the time I was pilot, according as the wind was fair or not. The plat A, represents the bulkhead bar. The distance from the outer side of Salem creek bar to the Pea Patch, would be about a mile and a half.

Joseph Way, a witness of Mr. Humphrey's, having been duly sworn by Mr. Justice Sharwood, says: I have been on the river since

1793; have lived in Philadelphia since 1812. Before that time I lived ten years at Cape May; I am 83; I am acquainted with the river between here and Delaware city. I am acquainted with the Pea Patch; it has always been considered that the west channel is the main ship channel; it has been so considered, except, perhaps, for a time since the war, then the Jersey side was considered the main channel. Abreast of the Pea Patch the channel—the west channel—filled up, and then, afterwards, it opened again, and became again the main channel. I am acquainted with the shoal opposite Salem creek; it can hardly be called a bar. I don't know anything about such bar as is marked on plat A; the Pea Patch is rather nearest Jersey shore.

Cross-examined.

Before 1812 square-rigged vessels usually went the western channel; I know that I never went any other, unless I got in there in the night, and was in a small vessel. I was not in those days acquainted with that side; I never went in it; the other was always considered the best. There are now islands in places where, in my younger days, I have run ships, and there are places where islands have gone away into the water; the channel in those parts is constantly changing.

Before the war I never carried a large vessel through the eastern channel; I took the other side, which was considered the main channel. After the war the east channel was deeper; then the west channel again. The first 74 built in Philadelphia went down on the west side.

Joel Alderman, a witness of J. Humphrey's, having been duly sworn by Mr. Justice Finlay, says: I am 61 next December; have been in the river trade about 24 years—part of the time as a hand, and part as a skipper; first knew the river in 1805. The west was the main ship channel; I never saw a ship of any size go on the other; I have seen small craft; all larger vessels pass on the west. I should suppose the island is nearer the Jersey shore, but never took notice. I continued navigating from 1805; I have no knowledge since 1825, since when I have been at home; my vessel was not of more than 60 tons. I traded from Jersey side of the bay up to Philadelphia. In the war was in a gun-boat of the United States drawing $4\frac{1}{2}$ or 5 feet; I never paid attention to soundings.

William Galloway, a witness of J. Humphrey's, having been duly sworn by the mayor, says: I am not a pilot; I have traded up and down the river. I first commanded a boat when 10 years old; that is, my brother was asleep and I navigated her. I am 29 last Friday. The west is certainly the main ship channel; never saw a ship go up or down the other; there is not berth there to beat through; on the west there is. There are other reasons why a ship will go the west: 1st, if there was water enough (which there is not) to go by the bulkhead, there are eddying tides there, which make you have to stay her through, instead of beat her through—west there is no such thing, no obstruction whatever; 2d, the west

has anchorage, which there is not on the east, where the bottom is hard. Vessels have gone through the east on a full tide—full flood tide—because it is shorter; but vessels that have gone through then cannot go through now; and there is danger about the bulkhead shoal. It is muddier there; and after a heavy rain and a northeast wind it will fill up there; the flats will continue to rise. I know that the water is deeper on the east side of the Pea Patch, right abreast of it, but it is shallower as you come up to the bulkhead shoal; it there gets quite shoal. The island lies nearer to Jersey. I think there is no question its head lies nearer to Jersey, and I think the major part lies nearer to Jersey. The main force, or body of the water, is on the west. There is a great shoal extends out of Salem creek, and runs all the way up the bulkhead shoal; it runs out a great way. The bulkhead shoal spoils that channel; blocks it up, and vessels will only venture over on flood tide and fair wind, I should suppose.

I think the bulkhead is so shallow that scarce a steamboat drawing 5 feet, would go safely at full speed; she might bind—she would go, probably, at half speed, or else incur danger. I have been engaged as a trader from Salem to Philadelphia and Baltimore. My family lived at Salem; I lived in my boat. The draught of my vessel was from 9 to 10 feet. It depends on the wind which channel I took. I undertook to command a vessel at 14 years; that is, my brother and I together; one would command when the other was asleep. I believe the Pennsylvania went down the W. There was an opening then, which afterwards filled up; I don't think any man could be found to take a vessel of 20 feet water through there; I have many a time sounded. I don't think, to the best of my knowledge, a vessel of 20 feet could have passed through last year. I sounded last year; I have often sounded all those channels; hauled anchor, and that is better [than] sounding. I have sounded the west channel, and, in spite of Captain Schellinger, I think the Pennsylvania could go through there now. I could carry, now, 28 to 30 feet through there on a full tide; on a very full tide, I mean. The tide rises from 6 to 8 feet; 6½ to 7 is the ordinary tide.

Mr. Clayton now offers to read the return of James C. Mansfield to the commission, which was issued to him October 13, 1847. Mr. Bibb says that there are objections to the form of the interrogations, and to the substance which follows. The depositions and papers connected with them, the whole being returned herewith as exhibit No. 1, were then read, the points involved by by Mr. Bibb's exception being reserved. The witnesses whose depositions were read, were, Thomas Clayton, Kensy Johns, Robert H. Barr, Thomas Janvier, William Robinson, James Rogers, James Booth, George Sutton, James Sutton, William McKeaver, Charles H. Black, and Nathaniel Wolf.

Mr. Clayton then read a document, certified under the hand of the clerk and seal of the superior court of Delaware, New Castle county, to be a true copy of the record and proceedings, as the same now remain in the said superior court in the case of Mark

Richards *vs.* Florimond Dusar, otherwise called F. Dusar, referred to by James Rogers in his deposition in exhibit No. 1, accompanying these minutes.

Mr. Clayton read this record for the purpose of showing the correctness of Mr. Rogers's statement, *that every defence was set up that was considered available, and no plea to the jurisdiction was set up.*—See exhibit No. II, accompanying these minutes.

Mr. Bayard put in evidence a paper under the hand of the clerk, and seal of the district court of the United States for the Delaware district, containing "true copies of libels, &c., on record" in the said clerk's office; "and also extracts from the record in said cases." This certificate is dated 8th November, 1847.—See exhibit III, accompanying these minutes.

Mr. Bayard puts in evidence a compilation of the public laws of the State of New Jersey, passed since the revision in the year 1820. Arranged and published under the authority of the legislature, by Josiah Harrison: Camden. Printed by T. Harrison, 1833, and cites, p. 39, §§ 4, 5 and 6, of "a further supplement to an act for dividing and ascertaining the boundaries of all the counties in the province," passed January 21, 1709. *Passed the 28th November*, 1822. The sections quoted an act, § 4, "that the northern bounds of the county of Salem, shall be taken and deemed to be as follows: To extend from the middle of the channel, at the mouth of Old Man's creek, *to the main ship channel of the river Delaware*, striking the same at a right angle, and the southern bounds extending *from said ship channel* along the Cumberland line *to the middle of the channel at the mouth of Stow creek.*". § 5, "that the northerly bounds of the county of Cumberland shall be taken and deemed to extend *from the middle of the channel, at the mouth of Stow creek, to the main ship channel in the river Delaware*, striking the same at a right angle; and the southern bounds shall be taken and deemed to extend from opposite the middle of the mouth of West's creek, *to the main ship channel in Delaware bay*, making a right angle therewith." § 6 carries the boundary between Cape May and Cumberland county into Delaware bay, "until it strikes the line of said counties *at the ship channel of the said bay.*"

Adjourned until to-morrow, at 10 o'clock; when, present as before.

Mr. Clayton puts in evidence "the laws and acts of the general assembly of his majesty's province of Nova Cæsarea, or New Jersey, as they were enacted by the governor, council, and general assembly, for the time being, in divers sessions, the first of which began in November, 1703. *Printed and sold by William Bradford, printer to the king's most excellent Majesty for the province of New Jersey*, 1717." He cited p. 11, 13, "an act for dividing *and ascertaining the boundaries of all the counties in this province.*" It recites, "whereas, by *the uncertainty of the boundaries of the counties of this province*, great inconveniences have arisen, so that the respective officers of most of those counties cannot know the

limits of them. *For the preventing the same in time coming, and the better ascertaining the boundaries of them*, be it enacted, &c., &c. Burlington county concludes, "thence along ye said line of partition by Maidenhead and Hopewell, to the northernmost and uttermost bounds of the township Amwell; *thence by the same to the river Delaware; thence by the river Delaware* to the first mentioned station. Gloucester is *along* the said bounds *to the sea;* thence *along the seacoast to Great Egg Harbor river;* thence up the said river to the fork thereof; thence up the southernmost branch to the head thereof; thence direct to the head of Old Man's creek; thence down the same to *Delaware river to the place of beginning*, (the *mouth* of Pinranquin creek.) Salem county *begins at the mouth* of Jecais creek; thence up the same as high as the tide floweth; thence direct to the mouth of a small creek at Tuckahoe, where it comes into the southernmost main branch of the fork of Great Egg Harbor river; thence up the said branch to the head thereof; thence, &c., *to the Delaware river and bay* to the place of beginning. Cape May county begins at the mouth of Jaceacs creek; thence up the said creek, &c., far as the tide flows; thence along bounds of Salem county to the southernmost main branch of Great Egg Harbor river; thence down the said river *to the sea; thence along the seacoast to the Delaware bay, and so up the said bay, &c.*

Mr. Clayton puts in evidence "the acts of the general assembly of the province of New Jersey, from the time of the surrender of ye government of said province to the fourth year of the reign of King George II. Philadelphia: Printed and sold by William and Andrew Bradford, MDCCXXXII." He cited pages 19, 20, on which is found the same act as on the book last cited.

Mr. Bibb cites laws of the State of Delaware, published in 1829, and already in evidence, page 590, "*an act for the more effectual ascertaining and fixing the limits of the several counties within this government*," (the same act, section 4, cited ante, page 41, by Mr. Bayard,) in which act the divisional line between the counties of Kent and Newcastle is thus fixed: "The line dividing the counties of Newcastle and Kent *continued* from ye *mouth* of a branch issuing from the main branch of Duck creek," and running *westwardly*.

Cites also laws of the State of Delaware, published 1797, and already in evidence, volume 2, page 1174. "A supplement to an act entitled an act for opening and establishing a land office within the State," &c. Reciting that whereas the soil and lands of the State were formerly claimed by the crown of Great Britain, and whereas, by the treaty of peace, they became the right of the people of the State; "*and whereas the claims of the late and former pretended proprietaries of this State to the soil and lands contained within the same, are not founded either in law or equity, and it is just, right and necessary that the citizens thereof should be secured in ye enjoyment of their estates, rights and properties;*" and confirms all patents, &c., for lands within the State, by the duke of York, the proprietaries of Maryland, and the pretended pro-

prietaries of this State, made before January, 1760, *and absolves them of all sorts of rents, fines and services whatsoever.*

Mr. Bayard cites ye same book, page 1160. "An act for opening and establishing a land office within the State, and for ye sale of all vacant and uncultivated lands therein." This act passed June 19, 1793; enacts, section 8, page 1164, "*That nothing in this act contained shall impeach, impair, or in any manner whatever call in question the title to any lands in this State, held under any grant, warrant, survey, re-survey or patent, made or issued before ye year of our Lord*, 1776, *but that all such titles shall be good and available in law and equity.*"

Also, same book, page 1077. "An act concerning vacant and uncultivated lands," passed February 2, 1793. Reciting that the minds of the good people of the State are much alarmed and disquieted by warrants for surveying lands being issued, without the authority of the State, and that the peace thereof will be disturbed by such proceeding. Then section one makes it penal, in $100, for any body inhabiting the State to take or receive any warrant, or make or cause to be made any survey in consequence of such warrant, or take or receive any writing for any vacant or uncultivated lands, from any person not acting under the authority of the State. Section two enacts that no warrant issued *since July* 4, 1776, shall be laid or surveyed by any surveyor, nor any patent granted, or deed received, or any warrant or survey either issued or made *since July 4th, aforesaid*, under penalty of $100.

John Johnson, a witness of Mr. Humphrey, having been duly sworn by Alderman Cook, says: I am not a pilot, but a trader; have followed the river for 20 years; I am between 35 and 40 years, and now reside in Kensington. I have been acquainted about the Pea Patch; have been a great deal about all the channels, on both sides of Pea Patch. The west is considered the main ship channel, as far as I know. There is a bulkhead shoal which makes it difficult for vessels to go on the other side. Large vessels go west; I have very seldom seen a pilot take a large vessel east. One could not beat through with head wind. Not a large ship; a brig might perhaps go through. About 12 years ago, I surveyed them with United States surveyor. The largest volume of water is on the east, but the main channel is west. When I say the largest volume is on the east, I include the cove. Leaving the cove out, the largest volume is on the other side. I was continually, for six weeks or two months, with the United States surveyors, surveying these channels. I did not take much notice before that, although I have known them from a boy. Right close to the Pea Patch, opposite the Jersey shore, it is six fathoms deep. After that comes shoals. Channel may be 150 yards. It begins to get shoal soon after you get above the Pea Patch; small vessels generally go that way. I have seen a ship go through there in a fair wind. I have frequently seen them tack on the Delaware side.

I do not remember the exact year that I was with the United States surveyors; it was with Captain Williams; at least, he appeared to be the head gentleman. I was employed as an oarsman.

The bulkhead is above. Salem cove is nearly opposite the Pea Patch. On the west side the channel runs about centre. On east clear to Pea Patch. A cove runs whole way from Delaware city to Newcastle; channel runs to westward. I do not remember the relative width and depth of these two channels. When I was with Captain Williams, both were sounded, but I have no specific recollection. The west, I suppose, may be a couple of hundred yards or more.

John Adams, a witness of Mr. Humphrey, having been sworn by Alderman Cook, says: I am not a pilot, but a seafaring man; a waterman or trader on the river. I have been up and down river off and on for 22 years. I have been in ship drawing 18 feet; in some larger ones, I guess. The main ship channel is the west, or that which pilots so call. I have been through it in 50 square rigged vessels in my time. I never saw any large vessels pass up Jersey side, but one; and that is 20 years ago. The only shoal on the east side is the bulkhead. It may be 400 yards above island, I cannot tell exactly, before you come into shoal water. There was more water there 20 years ago than there is now. I once passed through in a large vessel on full tide and fair wind. We could not have beat through that channel; through the west you always can. Pilots always take them up west, and bring them down west. I have been on the island, and it is nearer I should say to Jersey.

The vessel on which I came up east was William Penn, 15 feet water. It is near 18 or 20 years ago. I was a sailor on her. I never commanded any but small schooners. I have been in almost all the packets, and in the New Orleans packets. I do not know much about the channel opposite the island on the east; it is very narrow, and runs close to the island. The channel on Delaware side is nearer Delaware shore. The east is the straight channel. It cuts a bite off the sea. The west is nearer the middle of the river. The Patch is nearer the eastward. What I call "the river" is on the west, because I have been through the west with 50 square rigged vessels, and have not been through the other with more than one. I think 5 fathoms is the greatest depth on the east. I should say channel on west is 150 or 175 yards; not over that. I cannot remember. I do not think that general depth of east exceeds 4 fathoms; it may be 20 feet. Channel *opposite* to island is wider on east; I speak of 20 years ago. That is the time I came through. I judge, by beating through in small schooner which did not draw more than 7 feet, and for them there was water enough. The channel near the bulkhead was better 20 years ago than now, I should suppose, but do not say for certain. I am unacquainted with the state of the channels now.

Re-examined.

The shoals opposite the Pea Patch and Salem creek come within 150 yards of the island.

Mr. Bibb offers Kilty's Laws of Maryland, 4to, Annapolis, 1799,

vol. 1; no pageing. At the beginning of the book, charter to Lord Baltimore, dated June 20, 8 Car. I, to show that Lord Baltimore's limits came but *to* Delaware bay and river.

George W. Tompkin, a witness of Mr. Humphrey's: It has been so many years (nearly 24) since I have been up and down the Delaware, that I don't know that I can give much light. I am not a pilot, but a master of a vessel of 45 tons, which I own and trade upon. I first become acquainted with Pea Patch in 1821. When I followed the water it was considered that the main ship channel was west. I took some pains to inform myself as to depth on both sides, and made some inquiries as to channels. My vessel was 45 tons, and drew about seven feet. I generally went on Jersey side, my vessel being small, and the distance being shorter on that side. With her I could beat up at any time and tide. So far as I could judge, it would have been imprudent to beat up with large vessels drawing 15 or 16 feet water. It would have been impossible for such a vessel to beat through with a head wind. I have no recollection of ever having seen more than one square rigged vessel go east, and that was on a flood-tide and with a southwest wind, which is a fair wind. The island is nearer to Jersey; that is to say, at the south end there is a little difference from Reedy point to that end, and from Salem creek to it; but the north end is nearer to Jersey. I am not now acquainted with the shoals, though I was when I traded there. Opposite to Salem creek the channel is very wide, there being at that place a sort of basin. Up towards the bulkhead it grows narrow, very narrow and difficult. You would not get a pilot to take a vessel drawing 10 feet water along there. There is a bar, called Goose bar, about a breast of the bulkhead, which makes the passage difficult; almost impossible, except to a person well acquainted with it. It is the two bars which come out, one from Finn's point, and one from the Pea Patch. It is this which makes the difficulty, or did so 20 years ago. Goose bar is rather above the range of the Pea Patch. From this narrow channel to the north point of the Pea Patch may be half a mile.

I first commenced navigation in the spring of 1821, and ceased in the fall of 1822; but I have been up and down the river since occasionally; not in my own boat. My vessel was the Betsy Taylor. She went from Philadelphia down to Egg Harbor; she hailed from Camden; draught, deep loaded, seven feet. I used east channel, but have passed through west. After you pass the bulkhead channel it is a broad and deep channel all the way down the Delaware. The eastern shore would be the nearest channel. Abreast the Pea Patch the channel is nearest the island on the east. I am not much acquainted with the west. The difficulty on the east is to get into it, or out of it, owing to the bulkhead at the north. The shoals or flats from Salem creek don't interfere with navigation.

Charles Goss, witness of Mr. Humphrey, sworn by Alderman Cook, says: I am a pilot between Philadelphia and Bristol, not down the river or bay. I became acquainted with the river 30

years and more. Since I was 10 years old, and I am now 50, on 3d July; west was always considered the main ship cannel. I used to live at Egg Harbor. I never did see a large vessel go east unless it was a light vessel in ballast. All the packets—the East India traders, the Liverpool liners, all large vessels, in short—are in the habit of going up and down the west. I have been on Pea Patch a gunning; can't say to which shore it is the nearest. Before the fort was commenced, I went to shoot reedbirds, and have shot a crow once and a while. I might have been nine or 10 years in habit of going up and down there. I have been down in all sized vessels; in General Wade Hampden when she was in the Charleston trade. Have been down since the last war; yes, indeed; I took west channel. I now live in Kensington, and pilot from here to Bristol, which I have followed for 16 or 17 years. I have been down the river since, taking passage to Egg Harbor in small vessels, such as we might take either channel with. I have been in both channels.

Eli Herbert, witness of Mr. Humphrey, sworn by Justice Sharswood, deposeth and says: I am acquainted with Pea Patch. I was there in 1813, from some time in the latter part of April or May to August. I went down to fish for Dr. Gale. He caught shad there. I was in company with Dr. Gale. I think there was 13, 14, 15, 16, 17 of us. There was thirteen of us to haul. Dr. Gale and J. Sermenter, (the son-in-law or step son of Dr. Gale,) employed me. They went down to fish. There was a house, a fish cabin, on the island; it was erected by Dr. Gale in April or May, 1813. The house was built for a fish cabin; it had berths—two tiers of berths—for the men to sleep in; it was boarded up at the sides, roofed in, and rain-tight, at all events. We all of us lived in that house, slept there, and cooked there. We caught some fish, not a great many, because I suppose the bottom was foul. I don't think it was much profit to Dr. Gale; I don't know, but his expenses seemed pretty heavy. I don't know how often his hands were paid off. I was paid by Mr. Sermenter, with whom I went as a boy or servant, more than anything else. We took provisions down with us. Dr. Gale remained from April to August. While we were there, General Bloomfield and two persons I did'nt know, came there. I did'nt know what his object was in coming there. They came in a boat, and got out of their boat into ours. I helped to row him round the island. I did myself hear him ask Dr. Gale what he would take for the island. I did not hear him say what he wanted the island for. The circumstances of which I speak occurred during our stay there. I do not remember whether General Bloomfield was in uniform or not, nor whether the others with him were. I believe Dr. Gale would have sold. He did not mention his price to me. He afterwards said, in the presence of the hands, that General Bloomfield wanted to buy the island. We left the house standing in 1813. I have not been down since.

At the time I was there, the west was called the main ship chan-

nel. It is nearer the Delaware shore than to the Pea Patch, I believe.

I was born July 5, 1798. I am sure it was in 1813 that I was on the island. I have the means of fixing the date. I went an apprentice in 1814, and it was a year before that. I do not know of my own personal knowledge, who put up the house or cabin, of which I have spoken in my examination-in-chief. I found it there when I went. It was not a large house, twelve to fifteen feet, one story high—high enough for a man to walk in. It was a board roof, no chimney; we used a stove, and there was a stove pipe hole. The boards were not planed—rough boards—pine boards I suppose; but whether the weather boarding ran up and down or cross-ways, I cannot say now. The house was not plastered; had a rough floor, raised on piles about three feet from the ground; had no brick or stone foundation work. I have never been there since I left the place in 1813. I can't say whether it was in April or May that I went there. I had seen General Bloomfield before, that is to say, I had seen a man at Bordentown that they called General Bloomfield. I do not remember whether their boat came to the Pea Patch from Delaware or from New Jersey. It was in our boat, into which he came from theirs, that he asked Dr. Gale what he would take for the island. They came some time in the forenoon, and remained long enough to go round the island. I do not remember the names of any of the hands there except one, that was Jamer Parcer. He is dead and gone, I reckon.

Re-examined.

People came over frequently from Delaware and from Jersey shore, and bought fish of us; from Dr. Gale, when he was at hand, and from the captain, when he was not. I dont mean that Dr. Gale went, at any time, absolutely away from the island. I dont remember the names of any one of the captains. I remember the name of one person who came over to buy fish; he was named Ribold and lived just opposite the island. We took the stove to the island of which I have spoken. The house on the island was just newly put up when I saw it.

Mr. Bibb puts in evidence a chart of Delaware bay and river, containing a full and exact description of the shores, creeks, harbors, soundings, shoals, and lands, and bearings of the most considerable land marks, &c., faithfully copied from that published at Philadelphia, by Joshua Fisher, &c., published May 12, 1794, by Laurie & Whittle, 53, Fleet-street, London. This chart is in a book of maps, called the Second Part of the North American Pilot, published 1795. The chart, or the original of it, is "recommended" as a very exact performance, and one which will greatly contribute to the safe navigation in ye said bay, as the several drafts, heretofore made, are very imperfect, and no dependence to be had on them." The names of twenty-two pilots and twenty-two masters of vessels are appended in engraving. On this map the channel is drawn on the W. and the island is drawn as a shoal.

Mr. Clayton offers a chart of "Virginia, Maryland, Pennsylvania, East and West Jersey; sold by John Mount and Thomas Page, Tower Hill," This map appeared to be from a very ancient plate, but "The English Pilot," in which it was a chart, bears date of "London, printed for Mount & Davidson, on Tower Hill, 1794." No island or channel is marked.

John Corkrin, a witness for the United States, having been duly sworn by Mr. Sharswood, says: I lived on the Pea Patch for fifteen years. I first went on in April, 1823, and remained till August of that year. I went on again in May, 1833, and remained on till the 29th of October, 1847. I was once turned out by process from the circuit court of the United States, New Jersey, December, 1838. After being turned out, I held under Mr. Hudson, as tenant at will. Mr. Hudson, I believe, married a grand-daughter of Dr. Gale. The United States turned me out of possession in November, 1843. Lieutenant Harrison took possession for the United States, and remained on the island six weeks. Then I returned and took possession for the United States. The United States had exclusive possession all the time that Mr. Hudson had not possession, and he had possession from December, 1838, till November, 1843.

The government built a fort on the island, embanked it, and built houses for workmen and for head quarters. The building cost from eight to ten thousand dollars. The head-quarters began in 1824, and the house of the assistant engineer, Mr. Behling, in 1823. The fort was made of stone, heavy masonry, very heavy wall foundation, I should think, about 14 feet thick. I should think that 300 guns could be mounted on the fort, i. e., that there were embrazures for that number, I once counted. I suppose from the appropriations made for the fort, it must have cost $800,000 or $1,000,000. It cracked after having been first put up, owing to having been put up on piles; the embankment at first was not of stone. The old fort was burnt February, 1831. When I first went there, the government had on the island, and now has, a great deal of valuable property. There has been there since, and is now, a great deal of such property: great quantities of timber and lumber, rigging, machinery, five steam engines, and a great deal of valuable property, which it is absolutely necessary that there should be an agent of the United States to take care of. (Mr. Bibb here reads a paper produced by the United States, on notice from other side, from one of the departments at Washington, a paper called memorandum of lease, signed and sealed by John Corkrin, Louis Greble, John Till, B. Cooper, Jerem. W. Colvin, Edward Cowden, William Powell, Isaac Jones, dated December 8, 1838, by which these persons agree with J. T. Hudson, of Alton, Illinois, to hold from him, as tenants at will, the island called the Pea Patch; see exhibit 3.

The persons whose names are to this lease, were with me on the island; they were all in the employment of the government as laborers or carpenters. After we were turned out by the writ in favor of the United States, Lieutenant Harrison afterwards went in, and after he had been in six weeks, I went in.

I have not any personal knowledge about the channels; I have frequently seen square rigged vessels, ships, and brigs, beating up and down the eastern channel. The United States ship Pennsylvania went down it in 1837, December. I believe from the Pea Patch to the Jersey shore, taking the whole island, is a greater distance than to the Delaware shore. I should think the greatest body of water is on the eastern side. The Delaware channel runs near the Delaware shore; the New Jersey channel is close to the Pea Patch, about the same distance from it that the Delaware channel is from the Delaware shore. The E. is nearer the centre of the river. I have seen between the Pea Patch and Delaware shore a bar exposed for 10 to 12 acres, which I never did on the other, which is the E. side. Which is the main ship channel, is a question I would not like to answer. I have seen the lead tried 6, 7, and 8 fathoms close to the island on the east side; and, about three winters ago, in time of ice, I saw a large ship pass up that channel—as large as one of Cope's liners.

When the Pennsylvania went down, she went about a half a mile from the island. (The clerk being desired by Mr. Bibb to note *that*, the witness says:) I could not judge *positively*. As to distance from the two shores, I should decidedly prefer the Delaware shore, as being the nearest. To the lower part of the island and about as near to the Delaware as to the New Jersey from the upper. But from both ends, I should say Delaware is nearest. I have rowed from Pea Patch to Delaware in 15 minutes, and I cannot do it to Jersey in less than 20. I have heard others say the same. I never measured the distance by △lation. I live in the city of Philadelphia. I first saw Fort Delaware in 1823. I passed by the island in 1817, and I think it was then in operation, and that operations were begun before then. I don't know from personal knowledge how it burnt down; I have heard that the parapet was covered with a wooden roof, and got ignited from a stove pipe that passed up from Lieutenant Tuttle's room. After the fort was burnt, all the new quarters were commenced under Major Delafield. The government had built all the buildings in the island; there are no private individuals who have built any. A declaration in ejectment was served on me in 1833, and I believe Colonel Thompson was the person who served it—he was there, I know, with some writ. I don't know James Low, nor who was the sheriff of Salem in 1833. I was on the island from May, 1833. Mr. Behling was on it in 1833, as assistant engineer under Major Delafield. John Garnes, William Long, Benjamin Cooper, were all there in 1833. Mr. Behling is now living, and is an agent for Mr. Dupont. In 1836, he was still assistant engineer, and also in 1838, when the writ was served. In the absence of Captain Delafield he had full charge.

In 1838, when the marshal came with the writ, no officer was there; Lieutenant Meigs gave orders. When Mr. Hudson's lease was brought to me to sign, I refused, and said that I would sooner be turned out. Mr. Hudson gave me his word of honor that if I signed it and the lease was not approved by Lieutenant Meigs, it

should be destroyed. I then signed it and despatched a special messenger to Lieutenant Meigs, informing him. He approved my act. After I signed it I remained till writ of hab. fac. pos. came from Delaware. I was on the island and a man named Edward Powers; only two families. He was discharged by Lieutenant Harrison, but did not leave the island. When the writ of possession was served from Delaware, I left the island and stayed away six weeks. My family remained upon it. I was in the employ of the United States, on wages, in charge of the public property. The declaration in ejectment was served on all the inhabitants of the tenements. I was one. When the writ of hab. fac. pos. came, there were only two families; I was there. I signed a paper in Mr. Roger's office, which gave me possession of the island. This paper was signed in Delaware. We never moved off our family after the writ of possession from New Jersey was served. During all the time, from the beginning of the Delaware suit, until the writ of hab. fac. pos. under it was served on me, and until last October, I was in the employ of the United States and paid by the United States, and so I was when I signed the paper to Mr. Hudson. I was taxed and voted in Delaware. I never knew any one upon the island to vote or to be taxed in Jersey, unless it was laboring man working at day's work and having his family in Jersey. Nobody ever disputed my right, except in a jocular way. I voted in Red Lion hundred, in St. Georges, on the canal. I voted there in 1846. I first voted in Delaware three or four or five years after I went to the island. I believe there was process served on me from Wilmington, by Wilson. I think I have that paper in my possession. I have seen public officers serve process from Delaware; constables who came there. I never voted in Delaware prior to 1838, nor at the general election of 1840. I could not leave the island. I had two or three hundred men under my charge. I was not requested or advised by any one, agent, officer of the United States, or other person, to go and vote in Delaware. I voted because I paid a tax and supposed I had a right to vote. I do not remember when I first voted or was first taxed. I did not vote before I was taxed. I did not vote so early as 1833, for my family at that time resided in Philadelphia. My wages never stopped from the time I was employed by Major Delafield, till the past month. I voted the first election after I was regularly taxed. I never knew of a constable coming from Salem to collect money. Fishermen frequently made the island a harbor, and I remember, two fishermen came there, one had broken the others head in the bay. A constable came after one of them from Salem, for assault and battery. This was on Sunday. He served the process on him. He had an instrument of writing; at least I supposed he had. He had a pistol, which was all the process I saw. The fisherman said he would go if a regular process came after him from Delaware, but that he did not acknowledge the jurisdiction of Jersey on the Patch. He did not go with the constable, who went away without him and never returned after him or took him from the island. They served me with a bill of taxes from New Jersey, in the fall of

1843. I refused to pay it. The amount was $18 or $20, a personal tax and a land tax. I never knew of any such demand prior to that time or since. It was the first bill of the sort ever presented; none other since. I did not pay it; I paid my taxes in Delaware, when demanded. If I met the collector and he asked me for my taxes, I paid him, if I had the money.

Adjourned till to-morrow at 10 o'clock, when present as before.

John Stul, having been duly sworn by Mr. Alderman Cook, a witness of the United States, says: I am 67 years old. I reside in this city, and have done so principally for 46 or 47 years. I formerly resided in Delaware; did so from 1799 to 1800, at New Castle. I was also there during two yellow fevers. While residing at New Castle, as shopkeeper, (I kept a small store there,) I had occasion, in July or August, 1800, to serve process on a man who was boatsman of the United States ship Scammon. I took the advice of Geo. Read, esq. He told me to follow the man as far as low water mark on the Jersey shore, but no further. I went over after him, and caught him at the end of the wharf in his boat as he was going to shore. He was outside of low water mark at the wharf. I brought him back to New Castle, and he gave me an order to the officer at Washington for his back wages. I sent this order on to Washington, and got the money for it. Geo. Read, esq., the counsel to whom, as I have said, I applied for advice in the matters, was a lawyer of eminence in Delaware—great eminence, I should think. He was district attorney of the United States, I believe. There were people who professed to know how to keep clear; they would steer close to the Jersey shore to avoid process. I do not profess to be a lawyer. Our custom was, in suing people, always to take process from Delaware. We never got any from Jersey. I was on terms of intimacy with the sheriff; boarded in his house a part of the time. Our instructions were never to go beyond the Jersey low water mark. I never knew any dispute about the jurisdiction. It was the well settled opinion in them days that the jurisdiction extended to low water mark on the Jersey shore. The man whom I arrested never sued me for trespass. He had a a lawyer with him; Mr. Brown, perhaps, of this city, then a young man; or it might have been a student of Mr. Bayard's.

The arrest was in July or August, 1800, directly opposite to New Castle, or a little higher up. I am certain of the year. Francis —— kept the ferry at New Castle. I don't remember the man who kept it at New Jersey. The ferry was from New Castle across, and back. It was licensed by Delaware.

Mr. Bibb now offers a chart of "Virginia, Maryland, Pennsylvania, east and west Jersey." This chart was obviously from the same plate as that one from the English Pilot offered by Mr. Clayton. It is an edition of the English Pilot, published in 1732; also offers a copy of Fisher's map, from the same plate as the other, only out of an edition of the 2nd part of the North American Pilot, published at London in 1800.

Mr. Bibb now offers certified copies from the Department of War, of the following letters, all of which appear more at large on exhibit V., accompanying these minutes.

J. T. Hudson to *the Secretary at War*, November 26, 1838.

J. T. Hudson to *the Secretary at War*, no date.

M. C. Meiggs to *Brigadier General C. Gratiot*, chief engineer, December 11, 1838.

Enclosing memorandum of lease, December 8, 1838.

F. A. Smith, captain and assistant chief engineer to *Lieutenant M. C. Meiggs*, December 13, 1838.

Jos. G. Totten, colonel and chief engineer, to Hon. *W. L. Marcy*, November 6, 1847.

This last letter appeared to be an original letter.

Title papers.—A copy, certified under the hand and seal of the surveyor general of New Jersey, November 10, 1847, to be "a true copy of the records entered in the book T, folio 207, 208, now remaining at the office of the surveyor general of the State of New Jersey, at the city of Burlington." It declares that by virtue of a warrant from the council of proprietors of West Jersey, dated *November* 4, 1743, ordering the surveyor general to survey to Samuel Atkinson and wife 600 acres of *unappropriated land* anywhere in the western division of New Jersey, below the falls of Trenton; and by virtue of a conveyance, April 6, 1744, from Samuel Atkinson and wife, to John Robbins of the whole warrant; and of a conveyance, October 6, 1784, from Elias Robbins, eldest son and heir-at-law of John Robbins, to Edward Hall of 52½ acres, and one-twentieth of said warrant. By virtue also of another warrant of 7 August, 1782, requiring survey of 5,000 acres of *unappropriated land*, anywhere in the western division of New Jersey, unto Daniel Ellis; and by virtue of a conveyance from Daniel Ellis to John Lawrence, of 600 acres thereof, the 8th of August, 1783; and by virtue of conveyance from John Lawrence, the 1st September, 1784, to Edward and Clement Hall, of 126 acres, a return of survey, 8th October, 1784, for said Edward and Clement Hall, had been made of an *island* in the river Delaware, called the Pea Patch, situate in the county of Salem, about one mile west from Finn's point in Penn's neck, and is about west of the mouth of Salem creek, and a little above the Rudy point; also nearly southeast by east from Hamburg about 2½ miles, and about south half a point west, from the tile house at Newcastle, distant about 4½ miles, giving points and courses, "containing 178 *acres of marsh, sand bank, and mud flats, and allowance for roads.*" This paper bears date 27 October, 1784, and the record adds: November 3, 1784, inspected and approved by the council of proprietors, and ordered to be recorded."

Mr. Clayton objected to the admission in evidence of this paper. After argument on both sides, it was admitted without prejudice, and open to all questions.

A copy certified, under the hand of the clerk and seal of the court of common pleas, to be a true copy of a deed from Edward

Hall and wife, to Henry Gale, as the same is recorded in the clerk's office. The deed is dated, February 27, 1813, and in consideration of $500, conveys "one-half of an island commonly called the Pea Patch island."

A true copy from the record, under the hand and seal of the surrogate of Salem county, containing proceedings in the orphan's court, concluding with a decree that the administrator sell the other moiety, belonging to the estate of Clement Hall, deceased. This decree appears to have been made November, 1811.

Certified copy in like form as the 1st deed to Gale, of deed, dated 27 February, 1813, Rebecca Hall, administratrix, Morris Hall and Morris Hall, jr., administrators to Henry Gale, recites the proceedings and the decree in the orphan's court, and in consideration of $500, conveys to Henry Gale the moiety of the island ordered to be sold.

An exemplification of the proceedings, judgment and execution, as the same remains on record in the office of the inferior court of common pleas of the county of Salem, in the case of Samuel L. James and John Hall, executors of Edmund Hall, deceased, against Henry Gale, in an action of debt, on bond. The certificate of copy is dated 30th October, 1847. This paper contains a copy of a fi. fa., dated September 20, 1831, (leviable upon real estate in default of personal,) *but contains no return to this fi. fa.*

An exemplification of certain proceedings between the same parties, in the supreme court of New Jersey, concluding with the return of Isaac Johnson, sheriff, dated February 28, 1831, that he had taken and levied on all the right of Henry Gale of, in and to all that certain island, tract of land and premises on which Fort Delaware is erected, containing 75 acres, &c. All subject to prior executions. Exemplification dated November 2, 1847.

A true copy, from the records of the clerk's office of Salem county, New Jersey, of a deed from Isaac Johnson, former sheriff of the county of Salem, to Jonathan Trumbull Hudson, esq., dated February 25, 1837. This deed conveys the whole island to Jonathan Trumbull Hudson, as the property of Henry Gale, for the sum of $10,700.

Deed: J. T. Hudson to James Humphrey, April 5, 1844, in consideration of $5, and for other good considerations, conveys the whole island to James Humphrey.

In these different conveyances of the island, *it is generally described as situated in the Delaware river, in the county of Salem, State of New Jersey.*

A letter from Wm. L. Marcy, Secretary of War, to Thomas Dickinson, jr., esq., *clerk of Salem county, N. J.*, dated War Department, Washington, Oct. 7, 1847, in which Mr. Marcy says: "I enclose *for record in your county* a deed from *James Humphrey to the United States.* When recorded, please return it to this department, with a note of the fee due on that account." To this letter was appended an affidavit, October 30, 1847, of Thomas Dickinson, jr., that the said deed has been recorded in the clerk's office of the

county of Salem, in the State of New Jersey, as directed in the said letter.

Certified copies, under the hand of the Secretary of War and seal of his office, (certificate dated —— November, 1847,) of the following letters, from the records of the said department:

WAR DEPARTMENT, *May* 17, 1813.

DEAR SIR: Will it not be possible to get your common councils, or committees of public safety, to apply fifteen or twenty thousand dollars to the erection of a work on the Pea Patch? This would be a substantial protection for Philadelphia, Wilmington and New Castle. If they will do it, I will find them an engineer who shall keep himself within the limits of the fund; and if he exceeds them, the United States shall pay the difference. I will do more; I will repay the whole sum so soon as the United States can obtain the private right to the soil and jurisdiction of the island, and of a few acres on the Delaware shore for a covering or auxiliary work.

I am, &c.,

JOHN ARMSTRONG.

Brigadier General BLOOMFIELD.

WAR DEPARTMENT, *May* 25, 1813.

SIR: You will order Lieutenant Thayer to Philadelphia to report to General Bloomfield, and to transmit to this department a plan and estimate of such fortification as the general may propose to erect on the island in the Delaware, called the Pea Patch.

I am, &c.,

JOHN ARMSTRONG.

Colonel JOS. G. SWIFT.

WAR DEPARTMENT, *May* 26, 1813.

SIR: Your letter of the 22d instant has been received. An officer of engineers has been ordered to report to you immediately. He will make a plan and estimate for the works at the Pea Patch.

I am, &c.,

JOHN ARMSTRONG.

Brigadier General BLOOMFIELD.

WAR DEPARTMENT, *March* 15, 1814.

SIR: You will please to transmit an estimate of the expense of erecting the towers, referred to in your report of the 5th instant, and designate an officer of engineers to superintend the works in the Delaware.

I am, &c.,

JOHN ARMSTRONG.

Brigadier General SWIFT, *New York.*

WAR DEPARTMENT, *July* 1, 1814.

GENTLEMEN: On the two subjects, in relation to which you did me the honor to confer with me yesterday, I beg leave to state that

the authority of the commanding general is competent to repair and keep in good condition Fort Mifflin, its guns, gun carriages and implements.

That a plan for fortifying the Delaware at the island called the Pea Patch, and the point on the western shore of that river, called Newbold's, by placing on each of them a martello tower, was approved in April last; that this work should be immediately commenced, and also a small covering work at Red-bank.

It is expected that the funds necessary for the accomplishment of these objects will be advanced by the corporation of Philadelphia, to be refunded by the department within one year after the termination of the present war, with interest at the rate of 6 per cent. per annum.

I am, &c.,

JOHN ARMSTRONG.

Messrs. Lieper, &c., *Philadelphia.*

War Department,
August 7, 1814.

Sir: You will instruct Captain Babcock to submit to the corporation a plan of enlarged works at the Pea Patch, with an estimate of the cost. This ought not to interrupt the present plan of a tower. It will protect the large work while making, and serve as its citadel when made.

I am, &c.,

JOHN ARMSTRONG.

General Bloomfield.

War Department,
August 31, 1814.

Sir: In a letter of this date to the committee of safety at Philadelphia, they are informed that you will communicate with them relative to the defence of that place, in which it seems advisable to concur in their measures as far as may be practicable. General Swift will repair to Philadelphia and advise with you and the corporation, and give instructions for erecting such works as they may approve at the Pea Patch.

I am, &c., &c.

JAMES MONROE.

General Bloomfield,
Commanding at Philadelphia.

War Dapartment,
December 23, 1814.

This department having been informed that if assurances were given to the corporation of Wilmington, that all moneys advanced to it by the United States should be confined in their expenditure to completing the works erecting on the Pea Patch, it would advance willingly and liberally, I have now the honor of assuring you that whatever advances are thus made shall be exclusively

confined to that object, and that an interest of 6 per cent. per annum will be allowed, until the sums so advanced are paid.

JAMES MONROE.

CORPORATION OF WILMINGTON, *Delaware.*

WAR DEPARTMENT,
December 23, 1814.

SIR: Understanding that it is your wish to aid the views of the general government by loans of money, on the condition that such loans will be confined exclusively to completing the works erecting on the Pea Patch, I now make you the assurance that this condition will be respected to the extent of the sum loaned, and that an interest of 6 per cent. per annum will be allowed on them until repaid.

JAMES MONROE.

WAR DEPARTMENT,
November 30, 1838.

SIR: *Your letter of —— date, respecting your purpose to take possession of the Pea Patch island, has been received.*

It is my intention to again present the subject to the consideration of Congress, and to urge their definitive action upon it. I can see no good likely to result from the step you propose to take, and would, therefore, advise you to refrain from all legal proceedings till it can be known what will probably be the action of Congress.

Very respectfully, your most obedient servant,

J. R. POINSETT.

J. T. HUDSON, Esq.,
City of New York.

Mr. Bibb cites acts of New Jersey, passed March 27, 1719, showing the establishment of East and West Jerseys; and the establishment of the surveyors' general offices, in which offices, respectively, shall be carefully entered and kept the surveys of all lands which shall hereafter be made within this province; and such entries shall be of record, and may be pleaded as evidence in any of his Majesty's courts of judicature within this province." This act found on the "Statutes of the State of New Jersey, revised," &c. Trenton, 1847.

Mr. Bibb offers two papers under the hand and seal of the clerk of the circuit court of the United States, New Jersey. The first purporting to be a copy of proceedings in circuit court of the United States for the third circuit in the New Jersey district, in the suit of John Den *ex dem.* Henry Gales *vs.* Henry Behling. This paper, which had a variety of certificates to various parts of it, as, first, of a true copy of the pleadings in the cause; second, of "a true copy of the evidence taken and filed in the cause;" third, a true copy of the minutes of said court; fourth, true copies of the depositions referred to on the minutes of the trial of the cause, was no where certified to be a true copy of the record. The first

of the certificates was dated October 27, 1847. The remaining three, October 28, 1847.

The second paper was certified, in like form as the first, to be a true copy of the declaration in ejectment, together with the notice to the tenants in possession, and the service thereof.

Mr. Bayard and Mr. Clayton objected to the reception of these papers. Mr. Bibb contended that the depositions were receivable, because Mr. Behling was in the employment of the United States, and therefore the parties in that suit were the same as the parties in this; that, accordingly, the witnesses whose depositions he offered to read, being dead, their depositions might now be used.

Mr. Arbitrator, after an argument had been made on both sides, said that Mr. Behling was not a tenant, under the United States, of the Pea Patch, nor anything more than a person employed there to superintend the government work. He also remarked that it was difficult to understand how, if he had been a formal tenant of the United States, the circuit court of New Jersey, or any court, could entertain a jurisdiction of a case which would make the United States a party. The arbitrator refused to admit the depositions.

The clerk understood the counsel of the United States not to make objection to the reception of the papers as evidence of *verdict and judgment*, this evidence being given under a reservation of a right on their part to object to its competency and effect, and subject also to every legal exception.

Hon. Thomas Lenickson, a witness of Mr. Humphrey, sworn by Alderman Cook, says: I have resided for my whole life in Salem county, and for the last 50 years in the town of Salem. I have been acquainted with the Pea Patch island upwards of 40 years; on it repeatedly. I cannot state the date of my first visit, as early as 1810; I think earlier. Nobody lived on it then. I knew Dr. Gale. I saw him on the island in the spring, I think, of 1813. He was employed with a gang of hands fishing with a large net for shad. There was erected there a hut or fishing cabin, and I was in it; newly built, I think, for, though I had passed the island before, I don't remember to have ever seen any building on it prior to that time. There was no building on the island but this shanty. I don't think I was on the island again while Dr. Gale was on it. I conversed with Dr. Gale on the island; bought fish of him that day. He had 12 hands, I suppose, besides his son-in-law. I don't remember specifically; but make no doubt he must have been at Salem, and I must have seen him there; no doubt. I was on the island in 1842 or 1843. I should think myself unable to judge which side it is nearest to. Any measurement of the distance by the eye is likely to be inaccurate, and I have never seen it measured. I know that the distance of the Jersey shore varies very much. I own a farm opposite the Pea Patch; a good deal of land there. I can speak of the wash for 20 years, not for 40. Since October, 1846, 30 feet of a bank eight feet high have been washed away. More or less is washed away nearly every year. Within 20 years it has washed more than 50 yards.

I was first on island in 1810, perhaps gunning. No habitation then on it. I found Dr. Gale on it in spring of 1813, shad fishing season. I think I was not on it more than once then, and may have remained a couple of hours. The house was rather larger than a common fishing hut, and may have been 15, 16, 17, or 18 feet. I don't know when it went down. My impression is—I don't recollect distinctly—but I believe it was standing after United States took possession. I was on island immediately after United States began to erect fortifications. Government began to bank, I believe, immediately after driving poles, and before. The shanty, as I have said, was temporary only. I should suppose it would have cost $100 to erect it. If made with rough boards on roof instead of shingles, not so much. The storm of October, 1846, was quite unprecedented. I never knew any so violent before. It destroyed all the banks on our river.

Aulay M. Park, a witness of Mr. Humphrey, sworn by Alderman Cook, says: I lived on the Pea Patch over six years and a half, beginning 1818. I was under Captain Babcock, the superintendent of the building of Fort Delaware. There was a writ of ejectment served on me in the absence of the commanding officer. I was in a boat passing from New Castle to Fort Delaware. The sheriff came alongside and served me. I received the writ and sent it on to Washington.

The main ship channel is the west. It is invariably taken, the west I mean, by all large vessels. I never saw any ship or square rigged vessel beating through the east. I once saw the Woodrop Sims pass up or down, very light and with a full tide. I should think this might have been in 1821. She steered about the middle of the river, opposite the island, and till she got above it. I don't *know* whether she was loaded or light. She had the appearance of a light vessel. I am not sure that it was the Woodrop Sims, but it was the largest vessel that I ever saw go through, and I remember it was a matter of wonder to all of us that she went that way.

The process of ejectment that I have mentioned was served on me in 1819 or 20.

George T. Boon, a witness of Mr. Humphrey, having been duly sworn, deposeth and says, I have been a navigator or owner of vessels on Delaware for about twenty-five years. I sailed part of the time with my father, as captain of a Salem brig. In 1825, I commanded a vessel from Salem to Philadelphia, draught about eight feet at most. In going from Salem *we* went invariably on east, on account of being much shorter. Passage was very difficult for large vessels, and was so for even ours. It was a very rare thing to see a large vessel pass east. The west was invariably considered the main channel. For twelve years past I have passed the Pea Patch daily in steamboat, for thirteen years prior I passed it once a week in a packet. In all that time I never saw a square rigged vessel beat through the west. I have seen them go through on a full tide and with a fair wind. There is a bar above puts out, called the

Horse Shoe, or bulkhead bar. It has increased of late, and is certainly nearer the Pea Patch than it was some years ago. The sloop channel is between the Horse Shoe and the Jersey shore. Narrow and difficult to pass. I was near to the ship Pennsylvania when she went down; she went directly under wharf on east side, quite near shore, perhaps within 150 yards. I was in a steamboat. Such a navigation, I should say, was attended with great difficulty. I have often stopped at the Pea Patch on my way down, and have often towed Liverpool packets; I never took one east. The west channel has gone nearer to Delaware shore than it was, nearer than I ever knew it. I should think the island was nearer Jersey. There are shoals from Salem creek, which extend two or three miles from Salem creek, above and below. It is estimated to be seven miles from Salem creek to Delaware city.

We were at lower point of island when Pennsylvania went through. We might have been a fourth or half mile from her on a direct line. The north end of island is nearer Jersey, in consequence of Finn's point putting out into the river. I never measured the distance; it has that appearance. I have not sounded abreast of Pea Patch on east side since I have been on my steamboat. It is quite shallow there out from shore. It must be twenty feet on channel or the Pennsylvania could not have passed: I pass along there only occasionally. I have sounded north of island lately. The west is not far from Delaware shore, perhaps fourth of a mile opposite Pea Patch; opposite Delaware city it runs closer in. I can't tell how wide exactly the west channel is; though I have sounded it. In neighborhood of Pea Patch the Jersey shore channel was quite narrow twelve years ago. There is no Goose island channel that I know of. There is a channel inside of the Horse Shoe; that channel I know all about it. This eastern channel runs close into Jersey shore, not more than fourth mile at furthest. It is not more than fourteen feet at ordinary tide, may, in places, be deeper. I can't say when I sounded it last, but I sound it whenever necessary. We run through there every day: and I sounded it when the last fog was, if you can tell. Fourteen feet is as much as you can steer through there, and it requires nice steering to carry so much as that.

Mr. Bayard reads the following letter from H. D. Gilpin, esq., Solicitor of the Treasury, to Mr Hudson.

OFFICE OF THE SOLICITOR OF THE TREASURY,
July 11, 1839.

SIR: I had the honor to receive your letter of the 27th June, in reply to mine of the 17th; and I have been in expectation of receiving the further communication which you promise, after consulting your counsel. The desire of the United States in the proceedings on their part being, as I stated to you, to try the question of title with as little delay as possible; and especially so as to bring it, if necessary, before the Supreme Court at their next session; and this being also, as I understood from you, your own wish, I have been

expecting that you would direct an appearance to the ejectment in the usual mode, upon which I might instruct the district attorney to consent to the judgment's being opened, and the case put at issue with as little delay as possible. This I still hope to do at a very early day.

In the meantime no measures have been adopted to take possession under the judgment, nor was it intended to resort to them if the case was put in train for a judicial decision on the question of title; it being expected that the property should remain in its present condition, and the articles thereon which belong to the United States should not be interfered with. I have, however, received from the Secretary of War, a letter dated the 6th instant, written by Mr. Behlin, the agent of the engineer department, in which he states that Mr. Cocklin, the overseer at fort Delaware, has informed him that your attorney came on the island on the 2d instant, and stated his intention of taking away the hay; and also intimated that he would take the bricks and other materials on the island. Of course, during the pendency of legal proceedings no interference of this kind could be allowed; and the great value of the United States on the island will make it necessary, should such be attempted, at once to take possession under the judgment. I shall, accordingly, give instructions to the district attorney in Delaware to have a writ of possession issued, should any such attempt be made before I am informed by you of the course you propose to adopt, but not otherwise.

I have no doubt that a satisfactory arrangement for trying the title and preserving the rights of both parties unimpaired, as they mutually desire, can be made; but you will perceive, from the circumstances I have mentioned, the necessity of this being done as speedily as possible, and of my desiring, therefore, an early communication from you on the subject.

Very respectfully, yours,

H. D. GILPIN,
Solicitor of the Treasury.

JOHN T. HUDSON, Esq.,
No. 65 Broadway, New York.

Adjourned until to-morrow, November 13, 1847—when present as before.

Mr. Bibb puts in evidence a compilation of the public laws of the State of New Jersey, passed since the revision in the year 1820. Arranged and published under the authority of the legislature, by Josiah Harrison, Camden. Printed by J. Harrison, 1833. He read from vol. II., page 366—"An act vesting in Henry Gale, his heirs and assigns, all the right and title of the State of New Jersey, of, in, and to, an island called the 'Pea Patch,' situate in the river Delaware, in the county of Salem, and State of New Jersey."

Passed the 24th of November, 1831.

Whereas it hath been represented to the legislature, that Edward Hall and Clement Hall became seized and possessed of the said

island, by virtue of a survey bearing date the 27th day of October, 1784, which was duly approved by the council of proprietors of West Jersey, on the 3d day of November, 1784, and duly recorded in the surveyor general's office of the said western division of New Jersey. And whereas the said Henry Gale, by divers mesne conveyances, under the said Edward Hall and Clement Hall, hath become seized and possessed of the same: And whereas it hath been suggested that the State of New Jersey hath some title thereto, and by reason thereof doubts have arisen concerning the title of the said Henry Gale, *therefore*,

Be it enacted, &c., That for divers good considerations moving thereunto, and also for and in consideration of the sum of one dollar, to the treasury of the State of New Jersey well and truly paid by the said Henry Gale, the receipt whereof we hereby acknowledge, *all the right and title of the said State of New Jersey to the said island called the Pea Patch, situate in the river Delaware, in the township of Lower Penn's Neck, in the county of Salem, and State of New Jersey, as mentioned and described in the beforementioned survey, with all and singular the appurtenances, be, and the same are hereby granted and conveyed to the said Henry Gale, his heirs and assigns forever: And that the same shall forever be vested in the said Henry Gale, his heirs and assigns, in as full and ample a manner as the State of New Jersey hath right and title to grant and convey the same:* Reserving, however, to the State of New Jersey the full right of jurisdiction and sovereignty in and over the same, as fully and amply, to all intents and purposes, as if this act had not been passed."

Leaming & Spicer's Laws, from 588 to 617; a variety of laws connected with the surrender (page 609) from the proprietors of East and West Jersey, of their pretended rights of government to his Majesty. April 15, 1702; with the queen's acceptance, page 647, of the same, April 17, 1702. At page 606, to show that the surrender was understood in England to be "upon such terms and conditions as are requisite *for preservation of their proprieties and civil interests.*

At 607, to show same thing: the proprietors' articles of condition being, as is stated by the English board of trade, "*only to secure their right in such things as are matters of property.*" At page 614, language of surrender confined to powers of government.

628, section 36. Instructions to Lord Cornbury, the first new governor, in which, "*for settling the properties and possessions of all people concerned therein, he is to propose to the general assembly the passing of such acts whereby the right and property of the proprietors to the soil may be confirmed to them.*"

Page 629, section 38. *To show that proprietors were to appoint surveyors and other persons to survey land and record surveys;* also to lay duties upon exports and imports.

Thomas Clark, a witness of the United States, having been duly sworn by Mr. Alderman Cook, deposeth and saith: I was in the service of the United States in 1813–'14 as captain of topographi-

cal engineers. I was ordered by the commanding general of the district to take possession of the island, and prepare it for fortification; I did this in the winter of 1814. I had previously prepared a block-house at Kensington. I landed on the island, I think, on Christmas day, 1814; at the time I landed there was no one in possession, and no vestige of any building; it was flooded every high tide. I was, as I have said, at this time in the military service of the United States as captain of topographical engineers. The witness produces a paper:

ADJUTANT GENERAL'S OFFICE,
Philadelphia, Oct. 19, 1814.

[GENERAL ORDER.]

Captain Thomas Clark, of the corps of topographical engineers, will proceed to Newcastle, Delaware, and report himself to Colonel Irvine, commanding at that station, whom he is to accompany on a reconnoissance of the island called the Pea Patch, and the vicinity; and, having performed that duty, will return to headquarters.

By order of Major General GAINES:

J. N. BARKER,
Asst. Adjt. Gen.

Captain Clark will make a detail of four men of Colonel Irvine's command, to attend him on the expedition.

J. N. BARKER, *A. A. G.*

The witness continues: The above was an order to report myself. After I got to the island I proceeded to make a wharf, or landing, and to embank as well as I could at that season of the year. I was on the island from Christmas day, 1814, till somewhere in June, 1816, as far as my memory serves me. I never drove any body away; there was nobody there to be driven away. Nobody claimed possession of the island, or asked me at all by what title I was there; crows were the only inhabitants of the island.

I had soldiers with me, also some workmen; perhaps a hundred soldiers, and thirty or forty workmen. I had taken down a temporary block-house, to be ready in the spring; I mean by block-house, a house made of large timbers, as large as we could join together, filled in with earth. We took down no shanty; we took down hulks, dismasted vessels. The order which I have referred to, and dated October 19, 1814, is not the order under which I went down in December of that year. I went down under another order, which is as follows:

ADJUTANT GENERAL'S OFFICE,
4th Military district, Philadelphia, Dec. 11, 1814.

[GENERAL ORDERS.]

Captain Clark will continue to act as engineer, in constructing the works of the Pea Patch, and will have command thereof, and of the garrison, until the island is completely fortified.

He will make requisitions from the United States for such men

as may be necessary for the construction and defence of the work, and *authorized* (sic) to employ such other workmen as may be required, and a specific intendant of workmen, if necessary, and to procure such materials and contingent articles as he may find requisite for the progress of the work.

Captain Clark will proceed himself to the Pea Patch, as soon as his attendance is necessary.

By order of Major General GAINES, commanding:

CHARLES J. NOURSE,
Asst. Adjt. Gen. U. S. A.

I erected habitations for the soldiers early in the spring. Indeed, I commenced in the winter to build huts, light habitations, out of boards, &c.

The evidence is now closed, each party reserving the right to produce a map, and Mr. Humphrey to examine a witness.

Adjourned till November 15, 1847, at this same place, 10 o'clock a. m.

NOVEMBER 15, 1847.

Parties and council meet as before, and Mr. Clayton, on behalf of the United States, produces a map called for on the other side. "A delineator of the Pea Patch on the Delaware river, with the adjacent shores and depth of the surrounding water in fathoms, from actual survey and soundings in 1819."

Adjourned until Tuesday, November 23, 1847, at 11 o'clock, a. m., in this place.

NOVEMBER, 23, 1847.

Met as before and adjourned to the Hall of Independence, which the city of Philadelphia had politely tendered to the arbitrator.

Mr. Bayard, on behalf of the United States, produces a commission from John Penn, Richard Penn, and Thomas Penn, proprietaries to the honorable Patrick Gordon, deputy governor, and others, dated May 12, 1732. It recites the difficulties between Penns and Lord Baltimore, in relation to the boundaries of their grants, and that certain boundaries had been agreed upon between them, as laid down upon a map in the margin of the commission. Mr. Bayard stated that the attempt thus to settle the boundary proved unsuccessful, and that it was not settled till Lord Hardwicke's decree in Penn *vs.* Baltimore, reported by the elder Vesey, vol. i. 444.

Adjourned to meet in this place Saturday next, November 27, at 10 o'clock.

SATURDAY, *November* 17, 1847.

Met in the Hall of Independence.

Mr. Bayard, for the United States, began his argument for the United States, and continued it on Monday. Mr. Bibb, for the defendant, began immediately after him, and continued on Tuesday and Wednesday. General Eaton began and finished his argument on Thursday. Mr. Clayton began his argument on Thursday, and concluded on Friday.

JANUARY 15, 1848.

The arbitrator, Mr. Sergeant, having directed the secretary to give notice to the counsel in the case that he would be ready to make his award in the city of Washington, on the 15th of January, 1848; which notice the secretary did accordingly give, was this day attended by the counsel of the parties, viz: John M. Clayton, Jas. A. Bayard, and R. H. Gillet, esquires, for the United States, and by George M. Bibb, for James Humphrey, at the Senate's committee room upon pensions, where, after delivering a written opinion, which occupied two hours in reading it, he made his award, of which the following is a copy, endorsed on each article of submission.

Award, (*in duplicate.*)

Under and by virtue of the foregoing agreement and submission, having heard the parties by their counsel, their proofs and allegations, and duly and deliberately considered the whole matter, and weighed the evidence and arguments on both sides, I do hereby award that the title to the Pea Patch island is in the United States.

In witness whereof, I have hereunto set my hand and seal, this fifteenth day of January, in the year of our Lord one thousand eight hundred and forty-eight, at the city of Washington.

JOHN SERGEANT, [SEAL.]

Witness:

JOHN WM. WALLACE.
JOHN M. CLAYTON.
WM. L. DAYTON.

Whereupon I delivered one copy of the award so signed, sealed, and witnessed, to John M. Clayton, esq., counsel for the United States, and the other copy to George M. Bibb, esq., counsel for James Humphrey.

JOHN WM. WALLACE.

WASHINGTON, D. C., *January* 15, 1848.

EXHIBIT No. 1.

IN THE MATTER OF THE PEA PATCH ISLAND.

To James C. Mansfield, esq., of Newcastle, in the State of Delaware, greeting:

Know ye, that in confidence of your prudence and integrity, and in conformity with and pursuance of an agreement in regard to the settlement, by arbitration, of the title now in dispute of the said island, dated the twenty-seventh day of February, A. D. 1847, by and between William L. Marcy, Secretary of War, on the part of the United States of the one part, and James Humphrey of the other, I have appointed you to be a "commissioner" in the said matter, and hereby give to you full power and authority to examine upon their respective oaths or affirmations, on certain interrogatories to be exhibited unto you as well by the said the United States as by the said James Humphrey, all person or persons whomsoever that shall be named to you by the said the United States, and to reduce their testimony to writing; and, when you have so done, you are to send the same to me at Philadelphia, together with this writ.

Witness my hand and seal, this 16th day of October, A. D. one thousand eight hundred and forty-seven, at Philadelphia aforesaid.

JOHN SERGEANT, [SEAL.]

Teste:
JOHN W. WALLACE, *Secretary.*

STATE OF DELAWARE, }
Newcastle county. }

To the Hon. John Sergeant:

The execution of this commission appears by certain schedules hereunto annexed and signed by the commissioner.

JAMES C. MANSFIELD,
Commissioner.

NOVEMBER 8, 1847.

In the matter of the Pea Patch island, before the Hon. John Sergeant, of Philadelphia, sole arbitrator, &c. &c.:

I certify that the following "order" and copy of "interrogatories," are true copies made by the arbitrator in the case, and of the interrogatories filed with me by the counsel of the United States.

Witness my hand and seal, this the thirteenth day of October, A. D. 1847, at Philadelphia, in the State of Pennsylvania.

JOHN WM. WALLACE, [SEAL.]
Secretary, &c.

October 13, 1847.

On motion of the counsel of the United States, it is ordered by the arbitrator, that a commission be issued to James C. Mansfield, esq., of Newcastle, in the State of Delaware, to take the depositions of witnesses on behalf the United States, *on* interrogatories filed, *ex parte*, on fifteen days notice to the claimant, or to John H. Eaton, esq., his solicitor, and that the secretary of the reference make out the commission.

Interrogatories to be administered to witnesses, to be produced, sworn or affirmed, and examined by and before James C. Mansfield, esq., commissioner of the town of Newcastle, in the State of Delaware, in the matter now pending before the Hon. John Sergeant, of Philadelphia, appointed to decide the title to the Pea Patch island, in the river Delaware, between James Humphrey, claimant, and the United States of America, now in possession of the said island.

1. State your age and place of residence. How long have you resided in that place? What is and has been your occupation or business?

2. Do you know the Pea Patch island, and how long have you known it? What was its condition and appearance when you first knew it? What was it in 1813, when the United States took possession of it? What was it worth to a private citizen before that or at that period? Was it worth the expense of a survey?

3. Look at the paper hereto annexed, and marked A; relate all your knowledge of that paper. Have you ever seen the warrant referred to in it? If so, what has become of that warrant? Why was that warrant, after it was laid on the island, not followed by possession? Was it a special warrant for the island by name and description? Was any survey necessary to perfect the title? Why did the owners of the warrant abandon the island.

4. Have writs or subpœnas been served by officers of Delaware, under the courts and justices of Delaware, on persons on that island? Relate all your knowledge herein.

5. Has the tenant on the island, ever since it was inhabited, been assessed and taxed as a citizen of Delaware, and voted in Red Lion hundred, in Delaware.

6. Were you present when General Bloomfield, of New Jersey, went on this island, in 1813, to examine it as a site for a fort? Who was present? Was any offer made to Dr. Gale, or any other person, for his title? Was there any doubt expressed about the title? Did any one then doubt the Delaware title? What official positions had General Bloomfield held in New Jersey? Did he go to Dover, and assist in procuring from the legislature of Delaware the grant of the island to the United States?

7. Has it always been considered and held by the courts, public officers, and lawyers of Delaware, that her title extended within a twelve miles circle round Newcastle, to low water mark on the New Jersey shore? Have you ever heard her title and jurisdiction over that part of the river Delaware doubted by any court, or public officer, or lawyer, in Delaware? Have writs been often issued out of her courts, to seize vessels or persons in all parts of the Dela-

ware river, within the circle, and was any dispute ever made before any court against her title and jurisdiction over all such parts? Relate all your knowledge herein, with all the circumstances.

8. Which is the main and deepest ship channel of the Delaware river opposite the island? Could a line of battle ship, with her armament, pass on any but the Jersey side? Which, also, is the widest and shortest channel?

9. Are Reedy island and Bombay Hook island in the State of Delaware? Have they always been held under the Delaware title, and occupied by taxables and voters in Delaware.

10. Have not writs been issued out of the Delaware courts, and served on persons on the Pea Patch island?

11. Has or has not Delaware always claimed jurisdiction and title over the Delaware river, and soil thereof, within the circle to low water mark on the Jersey shore? Has she not always exercised that jurisdiction when called upon or asked to do so?

12. Was any house or building ever erected on the Pea Patch island before the United States took possession of it in 1813? Was it ever embanked before that? Could any buildings have stood on the island before it was embanked in 1813 and 1814? Would not the tides and storms have carried away any such building? Was any person ever in permanent possession of the island before the government took possession of it in 1813?

13. Have the citizens of Delaware always fished and fowled on the river, and used it within the circle, under a claim of right to the river existing in the State of Delaware? Has the State passed laws, from time to time, to regulate the fisheries on it? Has the State ever failed to claim and exercise her jurisdiction and title over it to low water mark on the Jersey shore when called on to do so, or when there was any cause or occasion for her to do so?

14. Are the lands in Delaware held under the title of William Penn and his heirs? How did the Penn proprietors grant title? As a lawyer tracing title in trespass or ejectment back to the original claim, how did plaintiffs incept or begin their title papers? Was there ever any doubt, in the courts of Delaware, of the justice and legality of the Penn title to the lands in the State? Was it always a settled maxim with her courts that the Penn title under the duke of York was the true title to the lands and waters in Delaware? Have you seen a hundred or more, or how many, titles incepted in court by the Penn warrants, surveys, and patents? Are or not all the lands and waters in Delaware within the twelve miles' circle held under the Penn title? Relate your knowledge and experience herein fully, with your belief and the grounds thereof.

Lastly. Do you know, have you heard, or can you relate any other matter or thing which will benefit the United States in this case? If so, state it fully.

J. M. CLAYTON, *for United States.*

Endorsed by the clerk: "Filed October 13, 1847, and copy given to counsel of the United States on the same day."

DISTRICT OF COLUMBIA, } ss.
City and county of Washington, }

In the matter of the United States and James Humphreys concerning the Pea Patch island, before Hon. John Sergeant, arbitrator:

Joseph H. Waring, of the city and county of Washington, clerk in the solicitor's office, being duly sworn, doth depose and say: That, on the 15th day of October, 1847, he called at the dwelling-house of Gen. John H. Eaton, and served on the wife of said Eaton a copy of the foregoing interrogatories, with a notice of what they were endorsed thereon, and signed by the Solicitor of the Treasury; that said Eaton keeps no office distinct from his dwelling-house, as far as he can learn and as he believes; and that said Eaton's wife informed him that said Eaton was not at home, but had gone to Philadelphia.

JOS. H. WARING.

Subscribed and sworn before me, October 16, 1847.

W. CRANCH, *Ch. J., D. C.*

Deposition of the honorable Thomas Clayton, late United States Senator from Delaware, and formerly chief justice of the State of Delaware, a witness produced, duly sworn and examined at his house, in the town of Newcastle, on the first day of November, in the year of our Lord one thousand eight hundred and forty-seven, by virtue of a commission to James C. Mansfield, issued by the honorable John Sergeant, arbitrator in regard to the settlement, by arbitration, of the title now in dispute of the Pea Patch Island, by and between William L. Marcy, Secretary at War, on the part of the United States, of the one part, and James Humphrey, of the other part:

To the first interrogatory, the deponent answers:

I am seventy years old, and upwards; now reside, and have resided, in the town of Newcastle for fifteen years and upwards, and have resided all my life in the State of Delaware. I am by profession a lawyer.

To the second interrogatory, the deponent answers:

I know the Pea Patch island; the first time I was on it was soon after the United States took possession of it; they were then endeavoring to dig a well, but did not succeed in obtaining fresh water. When I first saw it, it was banked.

To the third interrogatory, the deponent answers:

I know nothing of the matters inquired of.

To the fourth interrogatory, the deponent answers:

I know nothing of the matters inquired of.

To the fifth interrogatory, the deponent answers:

I know nothing of the matters inquired of.

To the sixth interrogatory, the deponent answers:

I was present when General Bloomfield went on the island, in 1813. In further answer to this interrogatory, I say, I have understood that General Bloomfield held the office of governor of New Jersey, and was, ex officio, chancellor of the State. I know he did go to Dover to prevail on the legislature to make a cession of this island to the United States; he was accompanied by two gentlemen of the city of Philadelphia, as I understood. I was at that time a member of the legislature, and attorney general of the State of Delaware, and I had several conversations with General Bloomfield on t.e subject of the cession of the island to the United States. He seemed anxious to attain his object. He never expressed any doubt of the title of the State of Delaware to the island, nor did he speak of, or hint, at any title in the State of New Jersey, or in any one claiming under New Jersey.

To the seventh interrogatory, the deponent answers:

It has been held, as far back as my memory goes, by the courts, public officers, and lawyers of Delaware, that the title and jurisdiction of the State of Delaware extended to a circle of twelve miles around Newcastle, to low water mark on the New Jersey shore. I never heard the title or jurisdiction of the State doubted, over that part of the river Delaware, by any one, until the claim of Doctor Gale was set up to the Pea Patch; and since that, I have heard no one in the State of Delaware, lawyer or other, doubt the title and jurisdiction in the State. Writs have been issued by the courts of Delaware to seize vessels and persons in all parts of the river, indiscriminately, within the twelve mile circle, and I never knew such a seizure to be disputed in any court of Delaware, on the ground of want of jurisdiction over all such parts of the river.

To the eighth interrogatory, the deponent answers:

I have no positive knowledge of the matters inquired of in this interrogatory; but I refer you to the survey of the river Delaware, made by authority of the United States.

To the ninth interrogatory, the deponent answers:

I say that Reedy island, and Bombay Hook island, are in the State of Delaware. Bombay Hook, properly written, "Boonpries Hook"—for I have more than forty years ago examined the title to it—was not originally an island; but was made so by an artificial cut from Duck creek to the bay.

To the tenth interrogatory, the deponent answers:

I do not know.

To the eleventh interrogatory, the deponent answers:

The State of Delaware has invariably claimed jurisdiction and title over the river Delaware within the twelve mile circle, to low water mark on the Jersey shore, and the State has exercised that jurisdiction when called upon, or asked to do so.

To the twelfth interrogatory, the deponent answers:

I have no knowledge.

To the thirteenth interrogatory, the deponent answers:

The citizens of the State of Delaware have fished on the river Delaware under the title of the State of Delaware to the said river;

the State has passed laws to regulate fisheries on the river. To the residue of this interrogatory an answer has already been given.

To the fourteenth interrogatory, the deponent answers:

Lands generally in the State of Delaware are held under titles from William Penn, and his heirs. At the revolution, there was some land ungranted; such land was afterwards granted by the State in virtue of the act of 1793. The title from Penn was obtained by virtue of a warrant issued, and a survey by a public officer, and a patent issued by the proprietary. The inception of the title under the proprietary was by warrant and survey; such title, accompanied by possession, was by our courts very early adjudged a good title, without the patent; and this early decision of the courts has been recognised by acts of assembly of the State. I know that the courts, and all the lawyers of the State, have considered such title under Penn to be good, and such title is recognised by the act of 1793. I have seen many titles incepted in this way.

To the last interrogatory, the deponent answers:

I have nothing further to say.

Sworn, examined, and subscribed to, this first day of November, A. D., 1847.

THOMAS CLAYTON.

Eighteen hundred and forty-seven, before me,
JAMES C. MANSFIELD.

Deposition of Kensey Johns, esq., formerly chief justice of the late supreme court of the State of Delaware, afterwards chancellor of the State of Delaware, now a private gentleman, a witness produced, duly sworn, and examined, at his house, in the town of Newcastle, on the second day of November, A. D., 1847, by virtue of a commission to James C. Mansfield, issued by the Hon. John Sergeant, arbitrator in regard to the settlement by arbitration of the title now in dispute of the Pea Patch island, by and between William L. Marcy, Secretary of War, on the part of the United States, of the one part, and James Humphrey, of the other part:

To the first interrogatory, the deponent answers:

I was eighty-eight years and four months old on the fourteenth day of last month, October. I reside in the town of Newcastle, in the State of Delaware. I have resided here since the year 1780. My business has been a practising lawyer for twelve years; afterwards, chief justice of the supreme court of the State of Delaware for thirty-eight years; afterwards, chancellor of the State since that time, and at present living a private gentleman.

To the second interrogatory, the deponent answers:

I do know it, and have known it since the year 1780. At first it appeared almost the size of a man's hat. In 1813, when the

United States took possession of it, it had grown to be a large island. It was not worth a cent to a private citizen. The expense of banking would have been more than it was worth.

To the third interrogatory, the deponent answers:

I know nothing of the matters inquired of.

To the fourth interrogatory, the deponent answers:

I know nothing of the matters inquired of.

To the fifth interrogatory, the deponent answers:

I know nothing of the matters inquired of.

To the sixth interrogatory, the deponent answers:

I know nothing of the matters inquired of.

To the seventh interrogatory, the deponent answers:

It has always been considered and held by the courts, public officers, and lawyers of Delaware, as far as my memory reaches, that the title and jurisdiction of the State of Delaware extended to a circle of twelve miles around Newcastle to low water mark on the New Jersey shore. I have never heard the title and jurisdiction of the State of Delaware over that part of the river Delaware doubted by any court, public officer, or lawyer in Delaware on any occasion whatever. Within my knowledge and remembrance, writs have been often issued out of the courts of Delaware to seize vessels and persons in all parts of the river Delaware within the circle of low water mark on the New Jersey shore; and no dispute, question, or plea was ever made or suggested, within my memory, before any court in Delaware against the title and jurisdiction of Delaware over all such parts.

To the eighth interrogatory, the deponent answers:

I do not know.

To the ninth interrogatory, the deponent answers:

Reedy island and Bombay Hook island are in the State of Delaware. Those islands have always been held under the Delaware title, and occupied by taxables and voters in Delaware, so far as regards Bombay Hook. I know nothing of the inhabitants of Reedy island.

To the tenth interrogatory, the deponent answers:

I have no knowledge.

To the eleventh interrogatory, the deponent answers:

The State of Delaware, for the whole period of my remembrance, and as far as my researches extend, has claimed and exercised title and jurisdiction over the Delaware river and soil thereof, within the circle to low water mark on the Jersey shore, and the State has never failed to exercise this jurisdiction when called upon or asked to do so.

To the twelfth interrogatory, the deponent answers:

I believe no house or building was ever erected on the island before the United States took possession of it in 1813. The island was never embanked before that time. No building could have stood on the island before it was embanked. I believe the tides and storms would have carried away such building. I believe no person was in possession of the island before that period.

To the thirteenth interrogatory, the deponent answers:

I have no knowledge of the matters inquired of, except as to those parts that I have already answered.

To the fourteenth interrogatory, the deponent answers:

The lands in Delaware generally are held under the title of William Penn and his heirs. The Penn proprietors granted title by warrant, survey, and patent. In action of trespass or ejectment, the plaintiff incepted his title by the warrant and survey. I never heard of any doubt, in the courts of Delaware, of the justice and legality of the Penn title to the lands in the State of Delaware. It has always been held as the settled maxim within the Delaware courts that the Penn title, under the duke of York, was the true title to the lands and waters in Delaware. I have seen a great many (I cannot say how many) titles incepted in court by the Penn warrants and surveys. The lands and waters generally in Delaware, within the twelve mile circle, are held under the Penn title.

To the last interrogatory, the deponent answers:

I know nothing further.

KENSEY JOHNS.

Sworn, examined, and subscribed to, this second day of November, in the year of our Lord one thousand eight hundred and forty-seven, before me.

JAMES C. MANSFIELD,
Commissioner.

Deposition of Captain Robert H. Barr, agent of the Newcastle and Frenchtown Railroad Company, at Newcastle, a witness produced, duly sworn and examined at my house, in the town of Newcastle, on the second day of November, in the year A. D. 1847, by virtue of a commission to James C. Mansfield, issued by the Hon. John Sergeant, arbitrator in regard to the settlement by arbitration of the title now in dispute of the Pea Patch island, by and between W. L. Marcy, Secretary of War, on the part of the United States, of the one part, and James Humphrey, of the other part.

To the first interrogatory the deponent answers:

I am fifty-nine years of age and upwards. I reside in the town of Newcastle, in the State of Delaware, where I have resided for forty-three years, with the exception of nine years, during which latter period I resided in Philadelphia. My business and occupation has been that of a mariner until 1833, since which time I have been in the employment of the Newcastle and Frenchtown Railroad Company at this place.

To the second interrogatory the deponent answers:

I know the Pea Patch island, and have known it since 1803; when I first knew it it was nothing more than a mud bank, with reeds growing on it, the greater part of it covered with water at high tide.

In 1813 it was still a mud bank, with reeds, a roost and harbor for crows and blackbirds. I was frequently on it during the war;

there was great difficulty in landing upon it on account of the mud; it was worth nothing to any private citizen for any practical purpose, except that it might be kept for some speculative object at a future period; it would cost more than it was worth to bank it. I would here state that the island called the Pea Patch island is an island about the middle of the river Delaware, and lies entirely to the westward of a direct line from any of the wharves at Newcastle and a point on the Delaware side of the river, called Reedy point. Reedy point being the first point below the island.

To the third interrogatory the deponent answers:

I do not know anything of the matter.

To the fourth interrogatory the deponent answers:

I have no knowledge of the matter.

To the fifth interrogatory the deponent answers:

I do not know.

To the sixth interrogatory the deponent answers:

I was not present, and know nothing of it.

To the seventh interrogatory the deponent answers:

I have always understood that the jurisdiction of Delaware extended to low water mark on the Jersey shore; and never heard it doubted until the claim now in the course of investigation came up. I have nothing further to say in regard to the matters enquired of.

To the eighth interrogatory the deponent answers:

I have always considered the eastern channel the deepest opposite the island. The U. S. ship of the line Pennsylvania, in December, 1837, passed out through the eastern channel, and at that time it was decidedly considered by the pilots as the deepest channel. I think a line of battle ship, with her armament, could pass on either side of the island. I have understood from others, that the eastern channel, since the passing of the Pennsylvania, has filled up very much, and that the western channel is now the deepest. The eastern channel is the widest and shortest; yet the western channel is the most used, and on account of the soft bottom preferred, for a ship is less liable to injury if she ground.

To the ninth interrogatory the deponent answers:

I have always considered Reedy island and Bombay Hook island in the State of Delaware.

To the tenth interrogatory the deponent answers:

I know not.

To the eleventh interrogatory the deponent answers:

I believe she has; I have known some instances of officers here boarding ships for the purpose of serving process, but do not recollect the particulars.

To the twelfth interrogatory the deponent answers:

No house or building was ever erected on the island previous to the United States taking possession of it, within my knowledge; it never was embanked before that period. I believe no building could have stood on the island previous to that time; an ordinary building could not have withstood the tides and storms. I have no knowledge of any person being in possession of the island previous to 1813.

To the thirteenth interrogatory the deponent answers:

I have known the citizens of Delaware to fish and fowl on the river and on the island, and have been myself on the island fowling, that is, stopped in the guts in a boat, and wading through the mud. I have understood that this State has passed laws regulating the fisheries upon the Delaware river. I do not think that the State has ever failed to exercise her right of jurisdiction over the Delaware river to low water mark on the Jersey shore.

To the fourteenth interrogatory the deponent answers:

It is my impression that the lands in Delaware are held under the title of William Penn and his heirs, and of the other matters, inquired of in this interrogatory, I do not know.

To the last interrogatory the deponent answers:

I know nothing further.

ROBT. H. BARR.

Sworn, examined, and subscribed to, this second day of November, in the year of our Lord one thousand eight hundred and forty-seven, before me,

JAMES C. MANSFIELD,
Commissioner.

Deposition of Thomas Janvier, a witness produced, duly sworn and examined at his house, in the town of Newcastle, on the third day of November, in the year of our Lord one thousand eight hundred and forty-seven, by virtue of a commission to James C. Mansfield, issued by the Hon. John Sergeant, arbitrator, in regard to the settlement by arbitration of the title now in dispute of the Pea Patch island, by and between William L. Marcy, Secretary of War, on the part of the United States, of the one part, and James Humphrey, of the other part.

To the first interrogatory the deponent answers:

I will be seventy-five years of age on the twenty-fifth day of the next month. I now reside in the town of Newcastle, in the State of Delaware, where I was born. I have resided at Cantwell's bridge, in this State, and resided in the city of Philadelphia, from the year 1794 to 1800. Since 1800, I have continued to reside in the town of Newcastle. I served my time to the cabinet making business, at Cantwell's bridge; afterwards lived in Philadelphia about six years, where I followed my trade; afterwards was engaged in the mercantile business at Newcastle; afterwards in the packet and steamboat line from Philadelphia to Baltimore; now, and for fifteen years past, I have not been engaged in any particular business.

To the second interrogatory the deponent answers:

I have known the Pea Patch island as far back as my memory extends. I have sailed by it in a small vessel belonging to Joseph Taltow, when I was about fourteen or fifteen years of age, frequently. It was a waste island, with nothing but reeds upon it, and with a very full tide was covered over with water; a harbor

for crows, and immense quantities resorted to the island to roost; and the crows continued to resort to the island until the United States took possession. The island had increased in size, and was in the same condition when the United States took possession of it in 1813. I do not suppose it was worth a cent to any private person, before the United States took possession. I say certainly it was not worth the expense of a survey of the island for the purpose of locating it.

To the third interrogatory the deponent answers:

I knew Mathew Pierce well, and I have seen him write, and am well acquainted with his handwriting, and the name "Mathew Pierce" signed to the paper, marked A, are in his proper handwriting. I also knew Thomas W. Clark, whose name is signed as a witness, have seen him write, and am also acquainted with his handwriting, and the signature of Thomas W. Clark is in his proper handwriting. Of the other matters inquired of in this interrogatory, I know nothing.

To the fourth interrogatory the deponent answers:

I do not know.

To the fifth interrogatory the deponent answers:

I do not know.

To the sixth interrogatory the deponent answers:

I have no personal knowledge of the matters inquired of.

To the seventh interrogatory the deponent answers:

I have never heard it doubted, by any person whatever, that the title and jurisdiction of the State of Delaware extended over the Delaware river to low water mark on the Jersey shore, within the 12 miles circle around Newcastle. It has always been considered here that the title and jurisdiction over those parts, were unquestioned and indisputable. It is within my memory that Richard C. Dale, who was sheriff of Newcastle county, from 1803 to 1806, after summoning a posse, boarded a ship on her outward passage, and arrested a person on board of the ship after she had been run ashore on the Jersey side, nearly opposite the town of Newcastle; the names of the parties and the minute detail of the affair, I do not now remember. About twenty-five years since, I accompanied the deputy of the sheriff of Newcastle county, and with him boarded a sloop then between the Pea Patch island and the Jersey shore, and was with the deputy sheriff when he arrested the captain of the sloop by virtue of a writ, issued out of one of the courts of Delaware. The matter was compromised with me, the captain of the sloop paying the demand, and we let him go.

To the eighth interrogatory the deponent answers:

My knowledge of the matter is not sufficient to enable me to answer clearly.

To the ninth interrogatory the deponent answers:

Both these islands are in the State of Delaware, and have always been considered so.

To the tenth interrogatory the deponent answers:

I have no knowledge of the fact.

To the eleventh interrogatory the deponent answers:

The State of Delaware, as far as my knowledge and observation extends, has always claimed jurisdiction and title over the river Delaware and soil thereof, within the circle to low water mark on the Jersey shore, and the State has always exercised that jurisdiction when called upon to do so.

To the twelfth interrogatory the deponent answers:

No house or building was ever erected on the island, previous to the United States taking possession of it, and commencing the works there. It never was embanked before that time, to my knowledge or belief. I should very much doubt the standing of any building erected on the island before that period, as it must necessarily have been subject to the depredation of tides and storms; I never heard of any person being in possession of the island, or making any claim to it previous to that time.

To the thirteenth interrogatory the deponent answers:

The citizens of Delaware have always, within my remembrance, fished and fowled on the river within the circle of twelve miles, under a claim of right to the river existing in the State of Delaware. The State has passed laws, from time to time, to regulate the fisheries on the river Delaware. I have never heard of an instance in which the State has failed to exercise her jurisdiction and title over the river to low water mark on the Jersey shore, when called on to do so.

To the fourteenth interrogatory, the deponent answers:

The lands in Delaware, I believe, are held under the title of William Penn and his heirs; as to the balance of this interrogatory I am not sufficiently informed to answer.

To the last interrogatory, the deponent answers:

I know nothing further.

THOS. JANVIER.

Sworn, examined, and subscribed to, this third day of November, in the year of our Lord, one thousand eight hundred and forty seven.

JAMES C. MANSFIELD,
Commissioner.

Deposition of Captain William Robinson, of the town of Newcastle, in the State of Delaware, a witness produced, duly sworn, and examined on the fourth day of November, in the year A. D., 1847, at his house in the town of Newcastle, by virtue of a commission to James C. Mansfield, issued by the honorable John Sergeant, arbitrator in regard to the settlement, by arbitration, of the title now in dispute of the Pea Patch island, by and between William L. Marcy, Secretary of War, on the part of the United States, of the one part, and James Humphrey, of the other part:

To the first interrogatory, the deponent answers:

I am now past sixty-five years of age. I reside in the town of

Newcastle, and have resided here nineteen years. I previously resided in the city of Wilmington, and have resided in this county all my life. My business, until almost thirteen years past, was coach making; since that time I have been engaged as a waterman, in my own vessel; in early life I went occasionally in my father's shallop on the Delaware.

To the second interrogatory, the deponent answers:

I do know the Pea Patch island; the island lies about the middle of the Delaware river, in a south direction from the town of Newcastle, and on the western side of a direct point from Reedy Point (the first point below the island, on the Delaware side) to Newcastle. I was on the island about the year 1795; the island was then a marsh, which was overflowed at every full tide; it was covered with reeds and a kind of tangled vine. Some natural guts running through it, but no artificial work of any description. I have no knowledge of the condition of the island at the time the United States took possession of it, but suppose, from its situation and what I had seen of it before, that it was not worth embanking.

To the third interrogatory, the deponent answers:

I know nothing about it.

To the fourth interrogatory, the deponent answers:

I do not know.

To the fifth interrogatory, the deponent answers:

I cannot answer from any knowledge of my own.

To the sixth interrogatory, the deponent answers:

I know nothing about the matter.

To the seventh interrogatory, the deponent answers:

I have never heard the jurisdiction of the State questioned, over the river Delaware to low water mark on the Jersey shore, within the twelve mile circle. About fourteen years since, I accompanied the deputy sheriff, Isaac P. Walker, in a boat, for the purpose of arresting a person on board a schooner that was coming down close on the Jersey shore; the deputy sheriff boarded the vessel in that situation, and arrested the captain. I think the matter was compromised, and the captain was discharged from the arrest, on his paying some amount of damages claimed of him for running into a sloop laying at anchor off this town.

To the eighth interrogatory, the deponent answers:

The eastern channel is the widest and deepest channel abreast of the Pea Patch; as to the western channel, I do not know whether a line of battle ship, with her armament on board, could pass it or not. The eastern channel is also the shortest channel; I have passed through both channels many times.

To the ninth interrogatory, the deponent answers:

I know that Reedy island and Bombay Hook island have been always considered in the State of Delaware; but I know nothing of the inhabitants.

To the tenth interrogatory, the deponent answers:

I do not know.

To the eleventh interrogatory, the deponent answers:

I believe that Delaware has claimed and exercised jurisdiction

over the river within those parts; and have never heard of any other than Delaware exercising such jurisdiction, except the government of the United States.

To the twelfth interrogatory, the deponent answers:

I never saw or heard of a house on the island previous to 1813; no house could have stood there, when I first saw it, without being inundated with every full tide. I never saw or heard of any embankment upon the island previous to that time. I never heard of any person being in possession of the island, or making any claim to it, previous to that time.

To the thirteenth interrogatory, the deponent answers:

The citizens of Delaware have, since my remembrance, used the river for fishing and fowling, without hindrance or molestation, within the twelve mile circle. The Jerseymen have undertaken to hinder our citizens from catching oysters in Morris river cove; and I have understood they exercise some authority above the circle, and have taken some gilling nets.

To the fourteenth interrogatory, the deponent answers:

My knowledge is not sufficient to enable me to answer.

To the last interrogatory, the deponent says:

I know nothing further.

WILLIAM ROBINSON.

Sworn, examined, and subscribed to, this fourth day of November, in the year of our Lord one thousand eight hundred and forty-seven, before me,

JAMES C. MANSFIELD,
Commissioner.

In the superior court of the State of Delaware, in and for Newcastle county.

In the late supreme court of the May term, 1811.

Read, jr., G. R. Mark Richards, 54. *vs.* Rogers, Florimond Dusar—otherwise called F. Dusar.	For atta: Case. Bail in $2,600.

Sheriff's returns, attached as per inventory and appraisement, July 5, 1811, narr. filed, and rule plea. Pleas filed; replications and issue; afterwards judgment for the plaintiff on demurrer, afterwards of error and judgment reversed, on account of the insufficiency of the affidavit.

Attest:

SAMUEL BIDDLE,
Prothonotary.
Per P. B. BANDEVER,
Newcastle, November 1, 1847.

Deposition of General James Rogers, of Newcastle, Delaware, a witness produced, duly sworn and examined at his office in the town of Newcastle on the fourth day of November, in the year of our Lord one thousand eight hundred and forty-seven, by virtue of a commission to James C. Mansfield, issued by the Hon. John Sergeant, arbitrator, in regard to the settlement by arbitration of the title, now in dispute, of the Pea Patch island, by and between William L. Marcy, Secretary of War, on the part of the United States of the one part, and James Humphrey of the other part.

To the first interrogatory, the deponent says:

That he is sixty years of age and upwards; that he has resided for the last four years in the county at a place called "Boothhurst," about one mile and a quarter from the town of Newcastle; during which time his occupation has been that of a farmer; that from the first day of January, 1801, until his removal to his present place of residence, he lived in the town of Newcastle, and from the 18th day of May, 1803, down to his removal into the country, he was engaged in the practice of the law; and during twenty years of of that period was attorney general of the State of Delaware.

To the second interrogatory, the deponent answers:

He has known the Pea Patch island for a great many years; he believes his knowledge of the island extends very nearly as far back as his residence in the town. He obtained a particular knowledge of the island, called the Pea Patch, from a visit which was made by General Swift, of the engineer corps, to the island, with a view of examination of the island as a place for a fortification; the deponent, and also Major Stockton, then of the army, since Governor of the State of Delaware, now deceased, were taken to the island with General Swift, by Colonel Allan McLane, then the collector for the district of Delaware; some time was spent upon the island. As an inhabitant of the town of Newcastle, he, with many others, felt a deep interest in the inquiry General Swift was then making; and therefore his attention was particularly drawn to the general appearance of the island; the time of this visit was between the time of the declaration of war in 1812, and the commencement of the work upon the island on the part of the United States; the visit was made either pending the war with Great Britain, or shortly after. At the time of this visit, the condition and appearance of the island presented from two to four acres, of what might be called upland, or land that would not be covered with water, except by a high tide; the residue of the island was a marsh, with a thick growth of reeds, and must have been covered by every tide with water; the highest part had no growth of either trees or bushes, but a growth of some description of grass. There were no buildings upon any part of it; and the part covered with reeds was the roosting-place of hundreds of thousands of crows. The island was valueless to a private citizen, as, according to the belief of the deponent, it was not worth the expense of reclaiming.

To the third interrogatory, the deponent having examined the paper marked A, he answers:

That he believes the paper to be a paper belonging to the late Chief Justice Booth, whose daughter the deponent married, and found among his papers after his decease. It has been impressed upon the mind of the deponent for some years, that at some time he had seen a warrant issued for the Pea Patch island, which had been issued in favor of Mathew Pierce, and in which Mr. Booth was interested; and further, that if he ever did see such a warrant, he has no knowledge of what became of it. If this impression is correct, as to having seen the warrant, it was a special warrant for the island, by name and description; and according to the decision of our courts, such a paper, followed by possession, gave title without a survey or patent.

To the fourth interrogatory, the deponent answers:

That he believes, whilst he was attorney general, criminal process was served upon persons upon that island, and indictments framed and sent to the grand jury, for an offence or offences alleged to have been committed on the island, but does not recollect whether bills were found or not.

To the fifth interrogatory, the deponent answers:

He has no knowledge.

To the sixth interrogatory, the deponent answers:

He has no knowledge of the matter inquired of, further than that General Bloomfield was in command as a brigadier general, as he believes, during the war, and that his command, as he believes, extended to this place.

To the seventh interrogatory, the deponent answers:

It has been uniformly considered by the courts, public officers and lawyers of the State of Delaware, that her title and jurisdiction extended within a twelve mile circle around Newcastle, to low water mark on the Jersey shore; he has never heard her title or jurisdiction over that part of the river Delaware doubted by any court, public officer or lawyer in Delaware. He knows that writs have been often issued from the courts in Delaware for Newcastle county, and that by virtue of such writs, persons, vessels and cargoes have been arrested and seized within the jurisdiction above alluded to; and in no instance, within his knowledge, was the jurisdiction ever disputed, or any question made as to the jurisdiction of the State, when such persons were arrested or vessels and cargoes seized. The deponent has in many cases caused writs to issue and persons to be arrested, and vessels and cargoes to be attached and seized upon the river Delaware, and within the aforesaid jurisdiction, and has been concerned in cases where process of attachment have been issued by other members of the bar. He well recollects one case, in the supreme court, of Mark Richards against F. Dusar; he was counsel for the defendant, and every defence was set up that was considered available, and no plea to the jurisdiction was set up. An abstract from the record of the said suit, marked B, is hereto annexed. A copy of the entire record of the

said suit, this deponent believes, is in the possession of the counsel of the United States.

To the eighth interrogatory, the deponent answers:

He has no knowledge of the matters inquired of.

To the ninth interrogatory, the deponent says:

That Reedy island and Bombay Hook island, he has always understood, form a part of the State of Delaware; that the deponent was a part owner of Bombay Hook island, and always while he so owned paid taxes for the same in the county of Newcastle, and that the residents upon that island were assessed, paid taxes and voted in this county, until the island was attached, by an act of the legislature of Delaware, to the county of Kent.

To the tenth interrogatory the deponent, for his answer, refers to his answer to the fourth interrogatory.

To the eleventh interrogatory the deponent answers:

That, during his experience as a lawyer, he has always understood the jurisdiction of Delaware to extend over the whole ground embraced by the interrogatory, and that the State of Delaware has always exercised that jurisdiction in its fullest extent.

To the twelfth interrogatory the deponent says:

He has no knowledge of any house or building upon the island, previous to the commencement of the works by the United States; he has no knowledge of any embankment upon the island previous to the embankment put up by the United States. The deponent answers further, that, when he visited the island in company with General Swift, there was a spot embanked, from two to four acres, upon which he thinks a house could have been built without being swept off by tides or storms. The deponent has no knowledge of any actual possession of the island by any person, previous to the taking possession by the United States.

To the thirteenth interrogatory the deponent says:

He has no knowledge of any matters contained in the interrogatory, except as he has heretofore answered to previous interrogatories.

To the fourteenth interrogatory the deponent says:

The lands in Delaware are held generally under the title of William Penn and his heirs. The Penn proprietary granted title by warrant, survey, and patent. When deponent came to the bar he understood the rule, with respect to trespass involving title or ejectment, required the party to show title out of the proprietary; this rule was relaxed by the subsequent decisions of our courts, by which the party was permitted to begin his chain of title without first showing title out of the proprietary; but, notwithstanding this relaxation of the above rule, he has seen, in the trial of causes, many instances, where the title from the proprietary was given in evidence. With respect to lands held by warrant, survey, and patent, from William Penn and his heirs, the title has been universally held as good title. It has been always held by our courts that the Penn title, under the duke of York, was the true title to the lands and waters in Delaware, so far as his knowledge extends. He knows no other title than the Penn title, a few titles held by grant

from the aborigines, and from our own State, by grants issued from our Land Office.

To the last interrogatory the deponent answers:

That he has nothing further to state that he deems important to the United States.

JAMES ROGERS.

Sworn, examined, and subscribed to, this fourth day of November, in the year of our Lord one thousand eight hundred and forty-seven.

Before me, JAMES C. MANSFIELD,
Commissioner.

Deposition of Captain John Sutton, of St. George's, in Red Lion hundred, Newcastle county, and State of Delaware, a witness produced, duly sworn and examined at his house, on the 5th day of November, A. D. 1847, by virtue of a commission directed to James C. Mansfield, by the Hon. John Sergeant, arbitrator, in regard to the settlement, by arbitration, of the title now in dispute of the Pea Patch island, by and between William L. Marcy, Secretary of War, on the part of the United States of the one part, and James Humphrey, of the other part.

To the first interrogatory the deponent answers:

I am now in the eighty-first year of my age. I reside in the village of St. George's, and have resided here since the year 1788; I resided in the town of Newcastle four years previous to that time; I am a native of the State of Delaware, and have always resided in this State. During the four years I resided in Newcastle, I was learning the business of a ship-carpenter; afterwards I followed the business of a house-carpenter until 1801; afterwards I was engaged in the mercantile business and farming until 1832; since that time I have been farming.

To the second interrogatory the deponent answers:

I do know the Pea Patch island; .I have known it from my early boyhood up to the present time. When I first knew it, to the best of my recollection, it was just to be seen at high water, a mud bank, or marsh, extending up and down the river in a long narrow strip, covered with reeds or rushes of some description. The island about and after that time grew very fast. During my residence at Newcastle, I frequently passed up and down the river on both sides of the island; afterwards it became the resort of immense numbers of crows for roost; they would rise off the island in the morning in great clouds and spread over the country. During the time a premium was paid in this county for crow scalps. I have understood that people from this county made frequent excursions to the island, for the purpose of killing crows to obtain the scalps, on account of the premium, a great many of which I bought, understanding that a portion of them was killed

on the island, and got the premium from the county treasurer of this county. I was never on the island before the United States took possession of it. I was on the island after the United States began to build the fort. I do not suppose the island was worth a cent to any private citizen at the time the United States took possession. I am convinced it could not be worth the expense of banking.

To the third interrogatory the deponent answers, after looking upon paper marked A:

I know nothing about it.

To the fourth interrogatory the deponent answers:

I do not know.

To the fifth interrogatory the deponent answers:

I do not recollect sufficiently clear to answer.

To the sixth interrogatory, the deponent answers:

I was not present, nor do I recollect General Bloomfield by name, and do not know what situation he held in the State of New Jersey. I was a member of the legislature when the act of cession, ceding the island to the United States, was passed; there were several gentlemen at Dover on that occasion from abroad; I do not recollect their names or who they were, but I never heard the title of the State of Delaware to the island questioned or doubted; in fact, it was considered perfect and without a doubt.

To the seventh interrogatory, the deponent answers:

I have never heard the title and jurisdiction of the State of Delaware, over the river Delaware, within the twelve mile circle around New Castle, to low water mark on the Jersey shore, doubted by any person in the State of Delaware; and further I know not.

To the eighth interrogatory, the deponent answers:

I have always understood that the eastern, or channel upon the Jersey side of the island, was the deepest, widest, and main ship channel. When I lived at New Castle large vessels generally came through that channel, this I remember perfectly, and during the revolutionary war, being a boy, and living above the town of New Castle, I believe the British ships came up through that channel. I remember the blowing up of the "Augusta," a British ship of war, at the old Mud island fort. I have no recollection of having seen a very large ship pass through the channel on the western side of the island.

To the ninth interrogatory, the deponent answers:

Reedy island and Bombay Hook island have always been considered in the State of Delaware.

To the tenth interrogatory, the deponent answers:

I do not know.

To the eleventh interrogatory, the deponent answers:

I do not know.

To the twelfth interrogatory, the deponent answers:

From my boyhood up to 1813, I saw the island several times every year, and I never observed a house or building of any description upon it, and if there had been any building upon it I could not

have passed it unobserved. It never was embanked before 1813, to my knowledge. I am clearly of the opinion that no common building could have stood on the island before it was embanked, as the tides run very heavy on it. I never heard of any person being in possession of the island previous to 1813.

To the thirteenth interrogatory, the deponent answers:

The citizens of Delaware have fished and fowled on the river Delaware, and used it within the circle to low water mark on the Jersey shore, and I never heard of any of them being disturbed or molested.

To the fourteenth interrogatory, the deponent answers:

I cannot answer any part of this interrogatory.

To the last interrogatory, the deponent answers:

I do not think I can state any thing further.

JOHN SUTTON.

Sworn, examined and subscribed to, this fifth day of November, in the year of our Lord one thousand eight hundred and forty-seven, before me,

JAMES C. MANSFIELD,
Commissioner.

Deposition of Doctor James N. Sutton, of the village of St. George's, in Red Lion hundred, in the county of Newcastle, a witness produced, duly sworn and examined at his house, on the fifth day of November, A. D. 1847, by virtue of a commission to James C. Mansfield, issued by the Hon. John Sergeant, arbitrator, in regard to the settlement by arbitration of the title now in dispute of the Pea Patch island, by, and between William L. Marcy, Secretary of War, on the part of the United States of the one part, and James Humphrey of the other part:

To the first interrogatory, the deponent answers:

I am fifty years of age. I reside in the village of St. George's, Red Lion hundred, in Newcastle county, in the State of Delaware, and have resided here all my life. My profession is a doctor of medicine, and am now engaged in my profession.

To the second interrogatory, the deponent answers:

I know the Pea Patch island. I recollect it about thirty-five years since as a marsh island in the Delaware river; and, when I first knew it, it was a mere resort for crows, and such was its condition when the United States took possession of it. At the time the United States took possession of it, I do not consider it was worth anything.

To the third interrogatory, the deponent answers, after looking at the paper marked A:

I know nothing about it.

To the fourth interrogatory, the deponent answers:

I believe writs have been issued by the justices here and served on persons on the island; but I do not recollect the cases.

To the fifth interrogatory, the deponent answers:

John Corkran, who resided on the Pea Patch island for some twelve or thirteen years, voted at this place at, I believe, every general election, during his residence, without challenge or objection. I knew John Corkran from the time he first came to the State, and I believe he never resided at any other place in this State other than the Pea Patch. He could not have voted without being assessed and having paid a county tax. For twelve years past, with but one or two exceptions, I have been either inspector or a judge of the general election, and the right to vote here has always been strictly scrutinized. Parties are nearly equal, and each party, beside the judges, look closely to the qualifications of voters.

To the sixth interrogatory, the deponent answers:

I know nothing of the matters inquired of.

To the seventh interrogatory, the deponent answers:

I do not feel myself sufficiently informed to answer this interrogatory.

To the eighth interrogatory, the deponent answers:

I know nothing of the channels.

To the ninth interrogatory, the deponent answers:

Reedy island and Bombay Hook island are in the State of Delaware. The inhabitants of Reedy island are assessed, and vote in St. George's hundred, in this county.

To the tenth interrogatory, the deponent answers:

I do not know.

To the eleventh interrogatory, the deponent answers:

I believe the State of Delaware has claimed and exercised jurisdiction over the Delaware river to low water mark on the Jersey shore within the twelve-mile circle.

To the twelfth interrogatory, the deponent answers:

I never heard of any person being in possession of the island before 1813, and it certainly was never embanked before that time.

To the thirteenth interrogatory, the deponent answers:

My information is not sufficient to enable me to answer.

To the fourteenth interrogatory, the deponent answers:

I am not sufficiently informed to answer the interrogatory.

To the last interrogatory, the deponent answers:

I have nothing further to state.

JAMES N. SUTTON.

Duly sworn, examined, and subscribed to, this fifth day of November, in the year of our Lord one thousand eight hundred and forty-seven, before me,

JAMES C. MANSFIELD,
Commissioner.

Deposition of William Cleaver, the elder, of the village of Port Penn, in St. George's hundred, New Castle county, in the State of Delaware, a witness produced, and, being conscientiously scrupulous of taking an oath, duly affirmed and examined, at his house in the said village, on the fifth day of November, A. D. 1847, by virtue of a commission to James C. Mansfield, issued by the honorable John Sergeant, arbitrator, in regard to the settlement by arbitration of the title now in dispute of the Pea Patch island by and between William L. Marcy, Secretary of War, on the part of the United States, of the one part, and James Humphrey, of the other part:

To the first interrogatory, the deponent answers:

I was seventy-seven years of age last August. I now reside in the village of Port Penn, in St. George's hundred, in New Castle county, State of Delaware. I have resided on my farm, adjoining the village, and in the village, ever since the year 1795. I was born in Cumberland county, in the State of New Jersey, from whence I moved to Salem, in New Jersey, in the year 1783, and then lived on the river shore, nearly opposite to the Pea Patch island, until I removed over to this county. My business and occupation have been almost exclusively farming and grazing; at present, I am not engaged in particular business.

To the second interrogatory, the deponent answers:

I do know the Pea Patch island. I have known it since the year 1783. When I first knew the island, it was a mud flat, with wild oats and a kind of wild grass growing upon it. I do not think there were any reeds growing upon it at that time; the mud I do not think was high enough or stiff enough to support reeds. Before I came to Delaware to reside, I was frequently on the island after ducks and geese. There was no part of it that was not overflowed at every full tide, except, probably, at the lower end; there might have been a small portion that a common full tide would not overflow. I was frequently on the island after I came to Delaware to reside, and continued to visit it, in the fall of the year, nearly every year, until the United States took possession of it in 1813. At that time, it was in much the same condition, with very little alteration that I could perceive. At the time the United States took possession, it could be worth nothing for any purpose but to gun on. I would not have given a cent for it for any other purpose.

To the third interrogatory, the deponent answers:

After looking at the paper marked A, I know nothing about the matter.

To the fourth interrogatory, the deponent answers:

I know nothing about it.

To the fifth interrogatory, the deponent answers:

I know nothing about it.

To the sixth interrogatory, the deponent answers:

I was not present, and do not know anything about it.

To the seventh interrogatory, the deponent answers:

I have no knowledge of the matters inquired of.

To the eighth interrogatory, the deponent answers:

I do not know the depth or width of the channels.

To the ninth interrogatory, the deponent answers:

Reedy island and Bombay Hook island, I have always understood, were in the State of Delaware; I know the man living on Reedy island, and I believe he votes in St. George's hundred.

To the tenth interrogatory, the deponent answers:

I do not know.

To the eleventh interrogatory, the deponent answers:

I cannot answer as to those matters.

To the twelfth interrogatory, the deponent answers:

From the time I first knew the island, up to the time the United States took possession of it, I never saw or heard of any house or building, of any description, upon the island, except muskrat houses. I am clearly certain that there could not have been a building, or house of any description, (except as above,) upon the island previous to that time; for I lived during the whole time, from 1783 to 1813, in sight of the island, my dwelling in Delaware, as well as in Jersey, being in full view of the island; it was never embanked before the United States took possession of it; if it had been embanked I would have seen the bank, or some traces of it; no ordinary or common building could have stood on the island previous to embankment; I do not know that any person ever had possession of the island, as owner or tenant, previous to 1813.

To the thirteenth interrogatory, the deponent answers:

I know that I, myself, and other citizens of Delaware, have fished and fowled on the Delaware river, but further I cannot say.

To the fourteenth interrogatory, the deponent answers:

I know nothing of the matter inquired of.

To the last interrogatory, the deponent answers:

I have nothing further to state, except that, for many years previous to the United States taking possession, the island was the roosting place of a vast number of crows; this was not the case when I first knew the island; according to the best of my recollection, the crows abandoned the Pea Patch soon after the United States commenced work on the island, and have since principally resorted to Reedy island, opposite to this place.

WILLIAM CLEAVER.

The said William Cleaver, being conscientious in regard to the taking of an oath, was duly affirmed, examined and subscribed his name hereto, this fifth day of November, in the year of our Lord one thousand eight hundred and forty-seven. Before me,

JAMES C. MANSFIELD,
Commissioner.

Deposition of Doctor Charles H. Black, clerk of the peace and register in chancery, at Newcastle, a witness duly sworn and examined at his office, in the town of Newcastle, in Newcastle county, in the State of Delaware, on the sixth day of November, in the year of our Lord one thousand eight hundred and forty-seven, by virtue of a commission to James C. Mansfield, issued by the Hon. John Sergeant, arbitrator, in regard to the settlement, by arbitration, of the title now in dispute of the Pea Patch island by and between William L. Marcy, Secretary of War, on the part of the United States of the one part, and James Humphrey of the other part:

To the first interrogatory, the deponent answers:

That he is about thirty-eight years of age; that from the year 1830 to the year 1840, he resided at Delaware city, Red Lion hundred, and was a practitioner of medicine from the year 1840 to the present time; he has resided in Newcastle, and held the offices of register in chancery and clerk of the peace, by virtue of said last office, clerk of the levy court of Newcastle county.

To the second interrogatory, the deponent answers:

That he has known the Pea Patch island only since the year 1830, a long time after the United States took possession of it, and consequently knows nothing of its value previous to that time.

To the third interrogatory, the deponent answers:

That he knows nothing.

To the fourth interrogatory, the deponent answers:

That he knows nothing.

To the fifth interrogatory, the deponent answers:

That he has reason to believe that, for many years back, all taxable persons permanently residing upon the Pea Patch island, have been assessed and paid tax in Red Lion hundred, Newcastle county, Delaware; but from his own personal knowledge, Mr. John Corkran, in the employ of the United States and residing on said island as agent or tenant, has for the last ten or twelve years been regularly assessed in Red Lion hundred, and during that time has paid tax and voted at the general election in said hundred. As corroberating this statement, in part, he begs leave to refer to paper C, hereto attached.

To the sixth interrogatory, the deponent answers and says:

He knows nothing.

To the seventh interrogatory, the deponent answers:

The deponent knows nothing of his own personal knowledge.

To the eighth interrogatory, the deponent answers:

That he does not know.

To the ninth interrogatory, the deponent answers:

That such has always been his impression.

To the tenth interrogatory, the deponent answers:

That he knows nothing.

To the eleventh interrogatory, the deponent answers:

That such has been his belief.

To the twelfth interrogatory, the deponent answers:

That he does not know.

To the thirteenth interrogatory, the deponent answers:

That such is his belief from general information.

To the fourteenth interrogatory, the deponent answers:

That he knows nothing, except that he has always understood that the lands in Delaware, within the twelve miles circle, referred to in this interrogatory, are held under titles from William Penn and his heirs.

To the last interrogatory, the deponent answers:

That he knows no other matter or thing that could benefit the United States in this case.

C. H. BLACK.

In the office of the clerk of the peace in and for the county of Newcastle, in the State of Delaware, the following assessments now remain of record, to wit: in the assessment of taxables in Red Lion hundred, in said county:

1836.	John Corkran,	poll tax,	300	Total,	300
1837.	"	"	300	"	300
1838.	"	"	300	"	300
1839.	"	"	300	"	300
1840.	"	"	300	"	300
1841.	"	"	400, plate, 4	"	404
1842.	"	"	400 " 4	"	404
1843.	"	"	400 " 4	"	404
1844.	"	"	400 " 4	"	404
1845.	"	"	400	"	400
1846.	"	"	400	"	400
1847.	"	"	400	"	400

STATE OF DELAWARE, } *ss.*
Newcastle county, }

I, Charles H. Black, clerk of the peace in and for said county, do certify that the above and foregoing is a true statement of the assessment of John Corkran, (or John Corkrin,) as taken from the assessment list for Red Lion hundred, in said county, and now remaining of record in my office.

In testimony whereof, I have hereunto set my hand, and affixed my seal of office, at Newcastle, the 4th day of November, A. D. 1847.

[SEAL.]

C. H. BLACK,
Clerk of the Peace, Newcastle county.

Deposition of Nathaniel Wolfe, Esq., of Newcastle hundred, in Newcastle county, late United States marshal for the district of Delaware, and formerly sheriff of the county of Newcastle, a witness produced, and being conscientiously scrupulous of taking an oath, was duly affirmed and examined at Newcastle, on the sixth day of November, A. D. 1847, by virtue of a commission to James C. Mansfield, issued by the honorable John Sergeant, arbitrator in regard to the settlement by arbitration of the title, now in dispute, of the Pea Patch island, by and between William L. Marcy, Secretary of War, on the part of the United States, of the one part, and James Humphrey, of the other part.

To the first interrogatory, the deponent answers:

I am now forty-nine years of age; I now reside in Newcastle hundred, in Newcastle county, in the State of Delaware, and have resided in this hundred since 1836. From November, 1836, to November, 1838, I resided in the town of Newcastle, during which time I was sheriff of the county of Newcastle, and afterwards, from April, 1841, to some time in 1844, I was the United States marshal for the district of Delaware; I am now engaged in farming.

To the second interrogatory, the deponent answers:

I know the island called the Pea Patch island; I first knew it in 1815; its appearance then was a mere marsh island; and further I cannot say.

To the third interrogatory, the deponent, after looking upon the paper marked A, answers:

I know nothing of the matter.

To the fourth interrogatory, the deponent answers:

I do not know.

To the fifth interrogatory, the deponent answers:

I do not know, except from report, and seeing the names of persons residing on the island on the assessment lists and duplicates for Red Lion hundred.

To the sixth interrogatory, the deponent answers:

I have no knowledge of the matters inquired about.

To the seventh interrogatry, the deponent answers:

As far as my experience and observation extends, it has always been held and considered by the courts, public officers, lawyers, and others of the State of Delaware, that the title of the State of Delaware extended within a circle of twelve miles around Newcastle, to low water mark on the Jersey shore. I have never heard the title and jurisdiction of the State of Delaware over that part of the river Delaware doubted by any person whatever; I have often heard of writs having been issued out of the courts of Delaware, to seize vessels and persons upon the river; I never executed, as sheriff of this county, but one writ; that was a writ of foreign attachment, issued out of the superior court, on the order of James A. Bayard, Esq., at the suit of the United States Insurance Company, against Edmund Didier. By virtue of the above named writ, I seized a quantity of specie on board the hermaphrodite brig Su-

san, then lying out in the river opposite the town of Newcastle, there was no objection whatever to the service of the writ.

To the eighth interrogatory, the deponent answers:

I do not know anything about the channels.

To the ninth interrogatory, the deponent answers:

Reedy island and Bombay Hook island are both in the State of Delaware. During my term as sheriff I had official business with several of the inhabitants of Bombay Hook island.

To the tenth interrogatory, the deponent answers:

I do not know that writs have been issued out of the Delaware courts and served on persons on the Pea Patch island; but I do know that, within the time I held the office of marshal for the district of Delaware, that, on the seventeenth day of September, A. D., 1843, I served upon John Corkran and Edward Power, as tenants in possession of the Pea Patch island, a writ of *scire facias*, issued out of the district court of the United States for the district of Delaware, and directed to the marshal to revive a judgment in ejectment in favor of the United States; and also, on the twenty-seventh day of November, in the same year, 1843, by virtue of a writ of *habere facias possessionem*, issued out of the above named court, and directed to the marshal of the district, I turned the same John Corkran and Edward Power out of possession of the Pea Patch island, and placed a certain lieutenant, —— Harrison, of the United States army, in possesion of the same island. The abovenamed writs were severally served and executed on the island.

To the eleventh interrogatory, the deponent answers:

I believe the State of Delaware has claimed and exercised entire and exclusive jurisdiction over the river Delaware to low water mark on the Jersey shore within the circle, with the single exception of such special jurisdiction as belongs to the United States government.

To the twelfth interrogatory, the deponent answers:

I do not know.

To the thirteenth interrogatory, the deponent answers:

The citizens of Delaware have used the river within the circle for fishing and fowling, under a claim of right existing in Delaware. I never heard of an instance, nor do I believe there ever was an instance, in which the State failed to exercise her jurisdiction over those parts of the river when called upon to do so.

To the fourteenth interrogatory, the deponent answers:

My information is not sufficient to enable me to answer the matters contained in this interrogatory.

To the last interrogatory, the deponent answers.

I know of nothing further that can benefit the United States in this cause.

NATHL. WOLFE.

The said Nathaniel Wolfe, being conscientiously scrupulous of taking an oath, was duly affirmed, examined, and he subscribed his

name hereto, this sixth day of December, in the year of our Lord, one thousand eight hundred and forty-seven, before me,

JAMES C. MANSFIELD,
Commissioner.

Deposition of the Hon. James Booth, Chief Justice of the State of Delaware, a witness produced, duly sworn and examined at his office in the town of New Castle, on the eighth day of November, A. D. 1847, by virtue of a commission to James C. Mansfield, issued by the Hon. John Sergeant, arbitrator, in regard to the settlement by arbitration of the title now in dispute of the Pea Patch island, by and between William L. Marcy, Secretary of War, on the part of the United States, of the one part, and James Humphrey of the other part.

To the first interrogatory, the deponent answers and says:

The deponent is fifty-seven years of age, his place of residence is in the town of New Castle. He was born there, and, with the exception of four years, when he was a student at Princeton college, and about fifteen months which he spent at Litchfield, in the State of Connecticut, as a student in the law school, then under the direction of the late Judge Reeve and Judge Gould of that State, this deponent has resided all his life in the town of New Castle. He at present holds the commission of Chief Justice of the State of Delaware, which he accepted the last of March, 1841; prior to that period he was engaged in the practice of the law, in the courts of the State of Delaware.

To the second interrogatory, the deponent answers:

He well knows the Pea Patch island, and has known it from his boyhood. When he first knew it, it was an island or mud flat overgrown with reeds, and almost the whole of it was often overflowed by very high tides in the Delaware river. Deponent does not remember precisely when the United States took possession of the island, but believes it was about the close of the late war between the United States and Great Britain, or soon after the treaty of Ghent. It was, at the time the United States took possession of it, covered with reeds, and was a harbor or place of refuge for innumerable crows. It was worth nothing to a private citizen at that time, not even the expense of a survey.

To the third interrogatory, this deponent, looking on the paper marked A, now shown to him by the commissioner, answers and says:

That he has seen the said paper writing among the papers of his father, the late Chief Justice Booth, during his life time and since his decease. The body of that part of the said paper writing which purports to be an acknowledgment, under the hand and seal of the late Matthew Pierce, that James Booth, this deponent's father, was entitled to a moiety of the Pea Patch island, is in the proper handwriting of this deponent's father, the said James Booth, now de-

ceased. Deponent, in his boyhood, and since his coming of age, has often heard his said father speak of the said Pea Patch island. According to the best of deponent's remembrance and belief, has heard him say at different times that he held a warrant for its location, that it would belong to him if he would go to the trouble and expense of a survey, but that it was not worth the expense; that if surveyed and a patent obtained it would be valueless without a very strong embankment, and that no embankment could stand against the storms of the Delaware, unless a very great expense was incurred, and wholly beyond his means. This deponent has said, particularly when some discussion took place in Congress respecting the title to the Pea Patch island, that he had formerly seen the warrant for the survey or location of the island by the name of the Pea Patch island in his father's possession, and also on record in the recorder's office at New Castle. What has become of the warrant this deponent is unable to say. He has heard that within the last two months a search has been made for the record of the said warrant, in the recorder's office at New Castle, by Cornelius D. Blaney, the late recorder, and that it could not be found. This induces this deponent to doubt the accuracy of his recollection in this respect, although his impression and belief are that he must have seen said warrant. The reason why the warrant was not actually located he has already stated, as having been derived from his father, namely, the expense of a survey, and the vast expense necessarily to be incurred in embanking the island. A survey was certainly necessary under the laws of the State of Delaware, to perfect the title, and deponent supposes the island was abandoned for reasons before mentioned.

To the fourth interrogatory the deponent answers and says:

That after the United States took possession of the Pea Patch island, and when he was engaged in the practice of the law, the process of the courts of the State of Delaware was often executed by the sheriff of Newcastle county, and his deputies, on said island. It was always considered to be within the bailiwick of said sheriff. This deponent has understood the fact to be so, but never was present, nor can he specify the particular cases in which said process was served as aforesaid.

To the fifth interrogatory the deponent answers and says:

That ever since the Pea Patch island has been inhabited, he has always understood, and believes it to be true, that persons living there have been assessed and taxed as citizens of the State of Delaware, and voted in Red Lion hundred. He has the impression on his mind, and believes it to be true, that on the day of a general election, many years ago, some persons then residing and working on the Pea Patch island, offered to vote at Newcastle; that their votes were refused on the ground that, if entitled to vote at all, their proper place of voting, under the election laws of the State of Delaware, was in Red Lion hundred.

To the sixth interrogatory the deponent answers and says:

That he has often seen General Joseph Bloomfield, during the late war between the United States and Great Britain; that during

the years 1813, and 1814, he was several times in the town of Newcastle; he was at one time the governor of the State of New Jersey. Deponent, when he was a student at Princeton college, had often seen him at Princeton on various occasions; that he resided either at Burlington, or Trenton, New Jersey; deponent believes at Burlington. When he visited Newcastle, in 1813, or 1814, deponent believes, according to the best of his recollection, that he was the commander of a military district, which then included the State of Delaware; but this deponent was not with him when he visited the Pea Patch island, nor has he any recollection of Colonel Bloomfield having visited it. This deponent is under the impression that General Swift, who deponent believes resided at Brooklyn, opposite New York, in 1816, with several other gentlemen, visited this island; but deponent cannot say positively at what time. Deponent has no knowledge of General Bloomfield's going to Dover, but has heard and believes he did so, in reference to the title of the State of Delaware to the Pea Patch island. Deponent knows nothing of any other matters in this interrogatory, except that at that time, and prior to the year 1819, or 1820, he never heard the title of the State of Delaware to the Pea Patch island called in question.

To the seventh interrogatory the deponent answers and says:

The courts, lawyers, and public officers, in the State of Delaware, and particularly in Newcastle county, always considered and held that the title of the State extended within the twelve mile circle, around the town of Newcastle, to low water mark on the Jersey shore of the river Delaware; that he never heard the title or jurisdiction of the State over that part of the river Delaware, doubted, or called in question by any court, public officer, or lawyer, in the State of Delaware. Deponent knows that writs have frequently been issued out of the courts of said State, to seize goods under the attachment laws of this State, and to arrest persons for debt on board of vessels, within the twelve miles circle, and never heard a question made, or doubt expressed before any court in the State of Delaware against the title and jurisdiction of the State in these respects. Such process was often issued, to the knowledge of this deponent, by the elder members of the bar of the State of Delaware, after he was admitted to the practice of the law, and during his practice, has been done by this deponent in several instances.

To the eighth interrogatory the deponent answers and says:

That since the Pennsylvania, a ship of the line built at Philadelphia, dropt down the Delaware and proceeded to sea, he has heard and understood that the deepest ship channel of the Delaware river, opposite the Pea Patch island, was between the island and the Jersey shore; deponent well remembers seeing the Pennsylvania proceed down the Delaware, and has understood and believes that she took the eastern channel, but is unable of his own knowledge to say that the fact was positively so. As to the rest of this interrogatory, deponent cannot answer of his own knowledge.

To the ninth interrogatory the deponent answers and says:

That Bombay Hook island is in the State of Delaware, and has always been held under the Delaware title, and occupied by persons who were taxable and voters in the State of Delaware. Deponent recollects that, a number of years ago, several writs of replevin were issued out of one of the courts at Newcastle, and executed by the sheriff of Newcastle county, at the suit of some persons then living on Bombay Hook, whose goods had been distrained on for rent, claimed by the heirs of Mr. Jonathan Smith, of the city of Philadelphia. Deponent says that Reedy island is in the county of Newcastle, and a part of the State of Delaware, but does not know that it has been ever held or occupied by any person.

To the tenth interrogatory the deponent answers and says:

To this interrogatory the deponent cannot answer, further than he has deposed to in his answer to the fourth interrogatory.

To the eleventh interrogatory the deponent answers and says:

That the State of Delaware has always, from his earliest recollection, claimed jurisdiction and title over the river Delaware and soil thereof, within the twelve mile circle, to low water on the Jersey shore. Such jurisdiction has always been exercised when required.

To the twelfth interrogatory the deponent answers and says:

That he has no recollection of any house or building being erected on the Pea Patch island, and is confident that none such was erected before the time the United States took possession of it; but in what year precisely the United States did take possession of it, this deponent cannot state positively. Prior to that time the island never was embanked, and before it was embanked by the United States, no common or ordinary building could have stood on it; any such building would have been carried away by the tides and storms of the river Delaware. This deponent never heard of any person being in permanent possession of the said island, before the time the United States took possession of it.

To the thirteenth interrogatory the deponent answers and says:

That the citizens of the State of Delaware have always fished and fowled on the river, and used it within the twelve mile circle, under a claim of right to the river existing in the State of Delaware. That the State has, from time to time, passed laws to regulate fisheries on it, and has never failed to claim and exercise her jurisdiction and title over it to low water mark on the Jersey shore, within the said twelve miles circle, when there was any cause or occasion to do so.

To the fourteenth interrogatory the deponent answers and says:

The lands in the State of Delaware are generally held under the title of William Penn and his heirs. Titles were granted under the proprietary government of William Penn and his heirs, by warrant, survey, and patent. In actions of trespass, where the title came in question, and in actions of ejectment, the plaintiffs formerly, as deponent has understood, incepting their paper title, always commenced by showing a title out of the proprietary. But for many years past this rule has not been adhered to, and the plaintiff now

traces his title no further back than to the person who was last actually seized and possessed of the land in controversy, as the owner thereof. There never was any doubt or question, so far as the knowledge and information of this deponent extends, of the justice and legality of the Penn title to the lands within the State of Delaware. The Penn title, under the duke of York, was always considered, in this State, the true title to the lands and waters in the State of Delaware; although this deponent has seen on record some old title papers for lands in this State from the aborigines of the country, and from Sir Edmund Andross, before the date of the deed from the duke of York to William Penn. This deponent has seen many titles incepted in court by the Penn warrants, surveys, and patents, and has always understood and believed that all lands and waters in the State of Delaware, within the twelve miles circle, are held under the Penn title.

To the last interrogatory the deponent answers and says:

This deponent does not know, nor is there anything else now occurring to his mind, that he heard, or that he can relate, which will benefit the United States in this cause.

JAMES BOOTH.

Duly sworn, examined, and subscribed to, at Newcastle, this eighth day of November, in the year of our Lord one thousand eight hundred and forty-seven.

Before me, JAMES C. MANSFIELD,
Commissioner.

December 16, 1796.

SIR: Please to issue a warrant in my name for two hundred acres of marsh, to be laid on an island situated about five miles below the town of Newcastle, in the river Delaware, called and known by the name of the Pea Patch.

MATHEW PIERCE.

JAMES BOOTH, Esq.,
Recorder of the county of Newcastle.

In consideration of James Booth relinquishing his fees on the above warrant, and subsequent proceedings thereon, and also defraying a moiety of other charges that may arise in obtaining a title to the above tract, I do hereby acknowledge that he is to be entitled to a moiety of the same premises in fee.

Witness my hand and seal, this 16th December, 1796.

MATHEW PEARCE. [SEAL.]

Witness present, THOS. H. CLARK.

EXHIBIT No. 2.

STATE OF DELAWARE, *Newcastle county.* } *to wit:*

In the supreme court of the State of Delaware, in and for the county of Newcastle.—Pleas before the Hon. Kensey Johns, Isaac Cooper, and Richard Cooper, esquires, justices of the supreme court of the State of Delaware, held at Newcastle, for the county of Newcastle, of the April term, in the year of our Lord one thousand eight hundred and eleven.

[SEAL.]

Among the records and proceedings whereof are the following:

Read, jr.,	Mark Richards	}
	vs.	
Rogers.	Florimond Dusar, otherwise called F. Dusar.	} 54.

Be it remembered that, heretofore, to wit, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and eleven, the said Mark Richards, by George Read, his attorney, in pursuance of the act of the general assemby, in such case made and provided, filed in the said supreme court a paper writing, in the words following, to wit:

NEWCASTLE COUNTY, *ss:*

Personally appeared Christian J. Brinckle, and maketh affirmation that Florimond Dusar, otherwise called F. Dusar, who resides out of this government, is justly indebted unto Mark Richards in a sum of money exceeding thirty-two dollars, and that he avoids coming into this government lest he should be taken to answer his just debts, as it is believed.

C. J. BRINCKLE.

Affirmed and subscribed at Newcastle, February 22, A. D. 1811, before

C. D. BLANEY, Jr., *Clerk.*

Whereupon the said Mark Richards, by his attorney, George Read, prosecuted and sued forth out of the said supreme court the writ of the State of Delaware of attachment against non-residents, directed to the sheriff of Newcastle county, in the words following, to wit:

NEWCASTLE COUNTY, *ss.*

[L. S.] *The State of Delaware to the sheriff of Newcastle county, greeting:*

We command you that you attach Florimond Dusar, late of your

county, otherwise called F. Dusar, by all his goods and chattels, rights and credits, lands and tenements, in whose hands or possession soever the same may be found in your bailiwick, so that he be and appear before the justices of our supreme court at Newcastle, on Tuesday, the eleventh day of April next, to answer Mark Richards of a plea of trespass on the case, &c., and have you then there this writ.

Witness the Hon. Kensey Johns, esq., at Newcastle, the eighth day of December, in the year of our Lord one thousand eight hundred and ten.

Issued February 22, 1811.

DANIEL BLANEY,
Clerk Supreme Court.

Upon which said writ was endorsed the words and figures following, to wit:

"Bail in $2,600."

And afterwards, to wit: on the sixth day of March, in the year of our Lord one thousand eight hundred and eleven, comes the said defendant before the Hon. Kensey Johns, esq., chief justice of the said supreme court, at his chambers, and with him a certain James Riddle, of the town of Newcastle, who acknowledges himself to be held and bound unto the said Mark Richards in the sum of two thousand six hundred dollars, to be levied of his goods and chattles, lands and tenements.

Upon condition that, if the said Florimond Dusar shall be condemned in the above action, that he shall pay all the condemnation money and the costs, to the value of the goods and chattles attached, or render himself a prisoner to the sheriff of Newcastle county; and, if he fails to do so, he, the said James Riddle, undertakes to do it for him.

Taken and acknowledged, March 6, 1811.

And afterwards, to wit: on Tuesday, the eleventh day of April, in the year aforesaid, and the day of the return of the aforesaid writ comes into court here, the said Mark Richards, by his attorney aforesaid, and the sheriff of Newcastle county aforesaid, to whom the foregoing writ was in form aforesaid directed, and makes return thereof to the court here, thus endorsed, to wit:

Attached as per inventory and appraisement—annexed, to wit: of foreign attachments, No. 53, April term, 1811.

So answers

TH. PERKINS, *Sheriff.*

Inventory and appraisement of the goods and chattels of Florimond Dusar, als. F. Dusar, attached at the suit of Thomas Mifflin, February 25, 1811, by

T. PERKINS, *Sheriff.*

To the one-half of the brig Caroline, Captain Blodget, master, together with her rigging, sails, boats, &c.....	$3,500
To 300 boxes sugar.....	15,000
	18,500

Appraised by us, the subscribers, this 23d day of February, eighteen hundred and eleven, as witness our hands.

HERM. WEBB,
JOHN BATES.

And thereupon the said plaintiff, by his attorney aforesaid, declares against the said Florimond Dusar, in words following, to wit:

NEWCASTLE COUNTY, *ss.*
Of the term of April, in the year of our Lord, 1811.

And whereupon the said Mark Richards, by George Read, his attorney, complains that whereas the aforesaid Florimond Dusar, the sixteenth day of October, in the year of our Lord one thousand eight hundred and ten, at the county aforesaid, did make his certain note in writing, called a promisory note, with his proper hand thereto subscribed, bearing date the same day and year. And the same note to the said Mark Richards, did, and there did, deliver, by which same note the aforesaid Florimond Dusar did promise to pay unto the said Mark Richards, by the name of Mr. Mark Richards's order, without defalcation, the sum of thirteen hundred and ninety-one dollars and eighty-five cents, lawful money of the State of Delaware, one hundred and twenty days after the date, for value received: By reason whereof, and by force of the statute in such cases made and provided, the said Florimond Dusar became liable to pay to the said Mark Richards the aforesaid thirteen hundred and ninety-one dollars and eighty-five cents, according to the tenor and effect of the note aforesaid; and so being liable, the aforesaid Florimond Dusar, in consideration thereof, after, to wit: the same day and year last mentioned, at the county aforesaid, upon himself did assume, and to the said Mark Richards, then and there did faithfully promise that he, the aforesaid Florimond Dusar, the aforesaid thirteen hundred and ninety-one dollars and eighty-five cents, unto the said Mark Richards, would well and truly pay, and content, according to the tenor and effect of the same note. Nevertheless, the aforesaid Florimond Dusar, his promise and assumption aforesaid, in form aforesaid made, not regarding the sum of thirteen hundred and ninety-one dollars and eighty-five cents, nor any part thereof, to the said Mark Richards hath not paid, although to do the same, the aforesaid Florimond Dusar, after the expiration of the time limited and appointed in the said note for the payment of the said sum of thirteen hundred and ninety-one dollars and eighty-five cents, to wit: on the and often afterwards, at the county aforesaid, by the said Mark Richards was requested, but the same to him to pay, hitherto hath altogether re-

fused, and still doth refuse, to the damage of the said Mark Richards, fifteen hundred dollars, and therefore he brings suit.

G. Reed, for plaintiff. John Doe, Richard Roe, pledgers.

And thereupon the said plaintiff, by his attorney aforesaid, prays that the said defendant may answer to the declaration of him, the said plaintiff, in the plea aforesaid; whereupon it is ruled by the court here, that the said defendant answer to the declaration of the said plaintiff in the plea aforesaid, or judgement will be rendered against him by default. Whereupon the said defendant, by his attorney, James Rogers, esq., answers the plea aforesaid, as follows:

1. Non assumpsit.
3. Payment.
2. Discount, and
4. Act of limitation.

As to the first plea, plaintiff joins issue. As to the second plea, the plaintiff replies no such account and act of limitation. As to the third, non-payment; and to the fourth, replications generally and specially. Rejoinders as to the three last pleas and issues. Thereupon further process of, and upon, the premises aforesaid, between the parties aforesaid, by consent of the said parties, by their attornies here, and by order of the court here, thereon, is continued from term to term, until November term, 1812. And now, to wit: November 10, 1812. Thirty jurors having been, by the sheriff of this county, duly summoned, returned and empannelled, out of which number a jury, to wit: John Bennett, John Penson, Jared Chesnut, James Thompson, Carson Wilson, Abraham Egbert, Alexander Moody, John Herdman, William Welden, jun., Christopher Weaver, Tenas Wells, and Richard Sixton, being duly drawn, who, after all causes of challenge allowed, did appear at the bar, and were duly sworn and affirmed to try the issues. Afterwards, to wit: the same day, by consent, a juror withdrawn, leave to amend the narr., and leave granted to the defendant to add pleas by the first rule day. And thereupon, the plaintiff amends his narr. in the words following and continued: "amend the declaration pursuant to the general leave in the suit, Mark Richards against Florimond Dusar, in the supreme court for Newcastle county, at Philadelphia, to wit: in laying the venue, this immediately preceeding the venue, and so in like manner, where the allusion to the venue occurs again in narr., and also the following money counts.

And whereas, also, the said Florimond after, to wit: The day of , at Philadelphia (in the year of our Lord eighteen hundred and) aforesaid, to wit: At Newcastle county aforesaid, was indebted to the said Mark in another sum of , money aforesaid for money lent and advanced to the said Florimond by the said Mark, at the special instance and request of the said Florimond before that time; and, being so indebted, he, the said Florimond, in consideration thereof, after, to wit: on the same day and year, at Philadelphia aforesaid, to wit: at Newcastle county afore-

said, undertook and faithfully promised to said Mark to pay him the said last mentioned sum of money when he should be thereunto after requested; and whereas, also, the said Florimond after, to wit: on the same day and year last aforesaid, at Philadelphia aforesaid, to wit: at Newcastle county aforesaid, was indebted to the said Mark in another sum of money aforesaid, for money by the said Mark before that time laid out, expended, and paid for the said Florimond, and at his special instance and request; and, being so indebted, he, the Florimond, in consideration thereof, after to wit: on the same day and year aforesaid, at Philadelphia aforesaid, to wit: at Newcastle county aforesaid, undertook and faithfully promised the said Mark to pay him the said last mentioned sum of money, when he should be thereto after requested; and whereas, also, the said Florimond after, to wit: the day of , in the year of our Lord one thousand eight hundred and , at Philadelphia, to wit: at Newcastle county aforesaid, was indebted to the said Mark, in the further sum of money aforesaid, for money by the said Florimond before that time had and received to and for the use of the said Mark; and being so indebted, he, the said Florimond, in consideration thereof, to wit: on the same day and year last aforesaid, at Philadelphia aforesaid, to wit: at Newcastle county aforesaid, undertook and faithfully promised to pay him the last mentioned sum of money when he should be thereto after requested."

And then substitute as a conclusion to the whole declaration:

"Nevertheless, the said Florimond, his several promises and assumptions aforesaid, in form aforesaid made, not regarding, but contriving, and fraudulently intending, craftily and subtily, to deceive and defraud the said Mark in this respect, hath not yet paid the said several sums of money, or any part thereof, to the said Mark, although so to do, he, the said Florimond, was requested, by the said Mark after, to wit: On the day of , in the year of our Lord eighteen hundred; and often after, to wit: At Philadelphia aforesaid, to wit: At Newcastle county aforesaid; but he to do this, hath thereto wholly refused and still refuses, &c., &c.

G. READ, *per plaintff.*

And the defendant pleads additionally as per plea filed, to wit:

And now, to wit, this sixteenth day of January, in the year of our Lord one thousand eight hundred and thirteen, comes the said Florimond Dusar, by James Rogers, his attorney, and says: That the said Mark Richards ought not further to maintain his action aforesaid against him the said Florimond Dusar, because he says that, after the third day of November last past, from which day, until the sixth day of April next, in April term next, the action aforesaid is continued, to wit: on the nineteenth day of November, in the year of our Lord one thousand eight hundred and twelve, he, the said Florimond Dusar, was discharged as an insolvent debtor, by virtue of an act of the general assembly of the commonwealth of Pennsylvania, entitled an act for the relief of insolvent

debtors residing in the city and county of Philadelphia, and their creditors, he, the said Florimond Dusar having, in all things, conformed to the provisions of the said act.

Wherefore the said Florimond Dusar prays judgment, of the said Mark Richards ought to have or maintain his action aforesaid against him, the said Florimond Dusar.

JAMES ROGERS,
Attorney for defendant.

Be it remembered that, on this fourteenth day of January, in the year of our Lord one thousand eight hundred and thirteen, personally appeared before me, John Barker, esq., mayor of the city of Philadelphia, the above named Florimond Dusar, and maketh oath that the substance and matter of fact of the above plea is true.

FLORIMOND DUSAR.

In testimony whereof, I have hereunto set my hand and caused the seal of the said city to be affixed, the day and year aforesaid. [L. S.]

JOHN BARKER, *Mayor.*

And the said Mark Richards, as to the said plea of the said Florimond Dusar by him above pleaded after the last continuance of the action aforesaid, saith: That the same and the matter therein contained, in the manner and form as the same are last above pleaded and set forth, are not sufficient in law to bar or preclude him, the said Mark Richards, from having or maintaining his aforesaid action thereof against him, the said Florimond Dusar, and that he, the said Mark Richards, is not bound by the law of the land to answer the same, and this he, the said Mark Richards, is ready to verify. Wherefore, for want of a sufficient plea in this behalf, he, the said Mark Richards, prays judgment and his damages, by reason of the not performing the said promise and assumption in the said declaration mentioned, to be adjudged to him, &c. And the said Mark Richards, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said plea after the last continuance of the action aforesaid: that the said plea does not state that the said Florimond Dusar was a citizen of the commonwealth of Pennsylvania, and had resided in the city or county of Philadelphia two years next before the time of presenting his petition, hereinafter mentioned, for the benefit of the act of assembly of the said commonwealth, the title whereof is set forth in the same plea; and that the same plea does not state that a petition was exhibited by the said Florimond Dusar to the commissioners appointed by the governor of the said commonwealth, under the authority of the said act, to execute all and singular the duties and powers granted, enjoined, and required by the provisions of the said act, setting forth his, the said Florimond, belief of his insolvency, and praying that he might be permitted to assign all his estate and property for the benefit of his creditors, and be dis-

charged by virtue of the said act; and that an assignment was made by the said commissioners of all the estate, real, personal, and mixed, of the said petitioner to the persons in the manner and form and under the exceptions prescribed in the said act of assembly; and that the said plea does not state that the said commissioners gave to the said Florimond Dusar a certificate, under their hands and seals, that the said Florimond had in all things conformed to and was discharged by virtue of the said act; and that the said plea does not conclude with a verification of the matter thereof; and that the said Florimond Dusar does not, in the conclusion of the said plea, pray judgment of the said Mark Richards ought *further* to have and maintain his action aforesaid, &c., but wholly omits the word *further* in the same conclusion of the said plea; and that no venue is laid in the said plea; and that the said plea does not state the tribunal and authority by which the said Florimond Dusar was discharged as an insolvent debtor, nor the place where he was so discharged, nor how or in what manner he was discharged as aforesaid; and that the said act of the general assembly, the title whereof is stated in the said plea, is contrary to the constitution of the said commonwealth of Pennsylvania, and, therefore, unconstitutional and void; and, also, that the said plea, after the last continuance of the action aforesaid, is, in other respects, uncertain, informal, and insufficient, &c.

G. READ, *per Plaintiff.*

And joinder in demurrer *general.* And thereupon further process of and upon the premises aforesaid, by the consent of the said parties by their attorneys aforesaid, and by order of the court here thereon, is further continued until the November term, 1813.

November term, 1813, *continued*, &c.

April 14, 1814, after argument of the matter of the demurrer, on motion of the counsel for defendant, leave granted to amend the plea in such manner only as it is amendable by law; and, afterwards, the court considering the said plea as amended to the extent and in such manner only as by law the defendant now has a right to amend the same; and it appearing to the court here that the cause of the said action is a promisory note, it is ordered by the court, in lieu of a writ of inquiry of damages, that it be, and is hereby, referred to the clerk of this court to ascertain the quantum of damages for which final judgment be rendered, as well by occasion of the premises, as for his costs and charges by him about his suit in that behalf expended, and report the same to the court. And after, to wit: on the same day and year, it appearing to the court, by the report of the clerk, that the damages in the said cause amount to one thousand six hundred and fifty-five dollars and eighty-three cents, and that the costs and charges therein, by his taxation, amount to forty-four dollars and twenty-seven cents,

Therefore, it is considered by the court here, that the said plain-

tiff recover against the said defendant the sum of one thousand seven hundred dollars and ten cents for his damages, costs, and charges aforesaid, and said defendant, in mercy, &c.; and the said plaintiff have thereof his execution, &c. And afterwards, to wit: on the ninth day of May, A. D., 1814, the said Mark Richards, by his attorney aforesaid, prosecuted, and sued forth out of the said supreme court of, and upon the judgment, so as aforesaid, recovered the writ of the State of Delaware, of *capias ad satisfaciendum*, directed to the sheriff of Newcastle county, in the words following, to wit:

NEWCASTLE COUNTY, *ss.*

[L. S.] *The State of Delaware to the sheriff of Newcastle county, greeting:*

We command you that you take Florimond Dusar, otherwise called F. Dusar, late of your county, if he shall be found in your bailiwick, and him safe keep, so that you may have his body before the justices of our supreme court, at Newcastle, on Monday, the thirty-first day of October next, to satisfy Mark Richards, one thousand seven hundred dollars and ten cents, lawful money of the State of Delaware, which, to the said Mark Richards, in our said court, before the said justices, were adjudged for his damages, costs, and charges, which he had, by occasion of the non-performance and assumption to the said Mark Richards, by the aforesaid Florimond Dusar, otherwise called F. Dusar, at the county aforesaid made, whereof the said Florimond Dusar, otherwise called F. Dusar, is convicted, as it appears of record; and have you then there this writ. Witness, the Hon. Kensey Johns, esq., at Newcastle, the fourteenth day of April, in the year of our Lord, one thousand eight hundred and fourteen. Issued, May 9, 1814: D. Blarney, clerk supreme court. At which said Monday, the thirty-first day of October then next, and the day of the return of the said writ, the said sheriff of Newcastle county, to whom the said writ in form aforesaid was directed, made return thereof to the said court, thus endorsed, to wit:

Non est inventus. So answers

WM. MOORE, *Sheriff.*

And now, to wit, April 16, 1815, on motion of James R. Black, esq., of counsel for James Biddle, rule to show cause why an examination should not be entered on the recognizance of bail, entered into in this case, continued, October; rule continued, April, 1814; rule continued, November; rule made absolute, and exoneration entered.

And, among the papers filed in the above cause, and of which no entry is upon the docket, is the following, to wit:

In the high court of errors and appeals of the State of Delaware—August term, 1815. *Rgos. V. D.*

Florimond Dusar, otherwise called F. Dusar, defendant below, plaintiff in error,
vs.
Mark Richards, plaintiff below, defendant in error.

May 10, 1815.—Writ of error to the justices of the supreme court of the State of Delaware, for Newcastle county.

May 10, 1815.—Writ and citation issued.

August 7, 1815.—Record received and filed at the same time.

Sheriff Moore returns *non est inventus*, August term, 1815. The defendant appears by George Read, esq., his attorney, and by consent, time extended for assignment of errors until the first day of October next. October 1, 1815, assignment of errors filed and continued.

And now, to wit, this twelfth day of January, in the year of our Lord one thousand eight hundred and sixteen, this cause coming to be heard, and the same being argued by counsel learned in the law, on both sides. It is considered by the court that the judgment of the court below be reversed and annulled; and that the plaintiff below, the defendent here, take nothing by his writ; and that the defendent below, the plaintiff here, go thereof without day, for that the oath, on the foundation of which the attachment was issued from the court below, was not taken before the clerk or a judge of the supreme court, and, moreover, was not according to form in such case provided by the attachment law.

In testimony that the above is a true copy of the docket entries in the above case, I have hereunto set my hand, and affixed the seal of the high court of errors and appeals, at Dover, the twelfth day of January, in the year of our Lord one thousand eight hundred and sixteen.

[SEAL.]

PRESLEY ALLEN, *Clerk.*

NEWCASTLE COUNTY, *ss.*

I, Samuel Fiddle, prothonotary of the superior court of the State of Delaware, in and for Newcastle county, hereby certify that the preceding pages contain a true copy of the record and proceedings in the aforesaid stated case, as the same now remain in the said superior court.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said superior court, at Newcastle, the twenty-third day of September, in the year of our Lord one thousand eight hundred and forty-seven.

SAMUEL BIDDLE, *Prot.*

STATE OF DELAWARE, *Newcastle county*, } *ss.*

I, James Booth, chief justice of the State of Delaware, and as such, the preceding judge of the superior court of the said State,

hereby certify that the preceding attestation made by Samuel Biddle, esq., prothonotary of the said court within the county of Newcastle, and to which the seal of the said court is affixed, is in due form, and by the proper officer.

In testimony whereof, I have hereunto subscribed my name, at Newcastle, the twenty-third day of September, A. D., 1847.

JAMES BOOTH, *C. J.*

EXHIBIT No. 3.

Memorandum of Lease.

We, the undersigned, do hereby agree with J. T. Hudson, of Alton, Illinois, to hold from him, as tenant at will, the island called the Pea Patch, upon which Fort Delaware is erecting, and to remove from thence quietly at whatsoever time we shall be by him the said Hudson or his agent or attorney directed.

It witness whereof, we have hereunto set our hands and seals, this 8th day of December, one thousand eight hundred and thirty-eight.

JOHN COCKRIN. [L. S.]
LEWIS GREBLE. [L. S.]
JOHN PILE. [L. S.]
B. COOPER. [L. S.]
JAS. CALVIN. [L. S.]
EDWARD POWERS. [L. S.]
WILLIAM POWELL. [L. S.]
N. DERICKSON. [L. S.]
WM. LONG. [L. S.]
ISAAC JONES. [L. S.]

In the presence of—
SAMUEL COOPER.
SAMUEL SMITH.

NEW YORK, *November* 26, 1838.

SIR: I had the honor to receive yours of the 20th, a few days since, and very much regret that, under present circumstances, I am *made* (unable) to comply with the suggestion contained in it.

I have already been obliged, by the hard course government has pursued towards me, to make such arrangements as render it *indispensable* that I should take possession of the property in question. But this I am still willing and desirous to do, with as little inconvenience to the United States as possible.

If, therefore, upon serving my writ, the officer in command should be authorized and willing to give me a stipulation that he will hold under me as tenant at will, and remove whenever required by me, I shall not insist upon the actual removal of himself and command, or disturb the works, until circumstances may render it necessary.

With the highest respect, your most obedient servant,

J. T. HUDSON.

To the Honorable the SECRETARY AT WAR.

This, and the following four documents, make exhibit No. 5.

Sir: In accordance with your wish, that you should be apprised of the time when the Pea Patch island would be taken possession of, I will state that it is my purpose to serve the writ any time between this and the first of December, that will best suit your convenience.

The process has been delayed until the close of the working season, in order that no unnecessary interruption or delay should be experienced by government.

If, during the coming session, the United States should see fit to purchase of the proprietor, the premises will be returned "in statu quo;" if not, they proceed to reimburse themselves for their losses, and improve their property as best they can.

With the highest respect, your most obedient servant,

J. T. HUDSON.

To the Hon. J. R. Poinsett,
Secretary of War.

Engineer Office,
Philadelphia, December 11, 1838.

Sir: I have the honor to inform you that on Friday, December 7, the United States marshal took possession of the Pea Patch Island, in execution of a writ of ejectment, issued by the United States district court of New Jersey against Henry Belin, and others, and in favor of J. T. Hudson, of Alton, Illinois, in whom the court have adjudged the title to the Pea Patch to rest.

On receiving information of this proceeding, I repaired immediately to the Pea Patch, and succeeded in making an arrangement with the parties, by which our agents and hands were allowed to remain upon the island, upon the householders thereon agreeing to remove quietly when required to do so by J. T. Hudson or his attorney. A copy of the agreement is enclosed.

I shall anxiously await instructions from the department.

I am, sir, your most obedient servant,

M. C. MEIGS,
Lieutenant of Engineers.

Brig. Gen. C. Gratiot,
Chief Engineer, Washington City, D. C.

Engineer Department,
Washington, December 13, 1838.

Sir: I have the honor to acknowledge the receipt of your letter of the 11th instant.

The Secretary of War sanctions the course you have pursued in permitting the inhabitants of the Pea Patch islands to acknowledge themselves tenants at will of Mr. J. T. Hudson, and should he re-

quire it, you are authorized to adopt the same with respect to the superintending engineer, Mr. Belin, but not for *yourself*.

You will report immediately to the department the whole of the facts in the case, stating the state of the operations at the fort when the writ of ejectment was served, with the circumstances, the effect it will have upon the progress of the works, and any circumstances you may judge proper to be laid before Congress to enable them to act in the premises.

By order:

F. A. SMITH,
Captain and Assistant Chief Engineer.

Lieut. M. C. MEIGS,
Corps of Engineers, Philadelphia, Pa.

I.

Exhibit No. 3.

To the Honorable Gunning Bedford, esq., judge of the district court of the United States of America in and for the Delaware district.

The petition and libel of Abraham Peisch, John William Foussat, John Dubany, John Francis Dumas, Thomas Allibone, and William Allibone, trading under the firm of Thomas Allibone & Son, Jacob Houpt, Charles Brugiere, (agent for J. A. Tenascon,) James Seraphim Duval, and James Pease, all citizens of the United States of America, owners and consignees of divers goods, wares, and merchandise, of foreign growth and manufacture, composing the cargo imported and brought in the ship Favorite, bound to the port of Piladelphia, within the limits of the United States aforesaid, from the port of Bourdeaux, in France,

HUMBLY SWOWETH:

That the ship Favorite, of and belonging to the port of Philadelphia, an American bottom, duly registered according to the laws of the United States, of which your petitioners and libellant, Abraham Peisch, is the owner, of the burthen of about "two hundred and thirty-seven tons," sailed from the port of Bourdeaux, in France, bound for the port of Philadelphia aforesaid, on the fifteenth day of September, eighteen hundred and four, under the command of William Penrose, master, being laden with and having on board a cargo of goods, wares, and merchandise of foreign growth and manufacture, consisting, according to the bills of lading and invoices in the respective possession of your petitioners and libellants, ready to be exhibited, and which they pray leave to exhibit to your honor, of wine, brandy, sweet oil, cordials, artificial flowers, and feathers, silk and other dry goods, of the value of thirty thousand dollars, lawful money of the said United States.

And your petitioners and libellants further show and allege, that the said ship Favorite, in the prosecution of her inward voyage aforesaid, arrived, on the twenty-fifth day of October, in the year aforesaid, in the bay of Delaware, and experienced the effects of a very heavy gale of wind, which occasioned the parting of her cables, and the said ship being forced on a shore in the said bay, where her situation became so perilous that the said William Penrose, her master, deemed it necessary to cut away, and did actually cut away, the parts of the said ship by the board; that the said ship soon after floated, and was borne and carried by the tide and wind off the ground where she struck as aforesaid, and it was then discovered that the said ship had, in consequence, sprung a leak, which gained so fast, after working the pumps almost four hours, that there were eleven feet and one-half foot of water in the hold of the said ship at the expiration of the said time; wherefore, the said master was induced to leave the said ship then and there in the Delaware bay aforesaid, to wit, on the twenty-seventh day of the said month October, with his crew, and land on Cape May, in the State of New Jersey, after, to wit, on same twenty-seventh day of October.

And your petitioners and libellants further show and allege that, afterwards, to wit, on some certain day or days between the said twenty-seventh day of October and the thirtieth day of the same month, the said ship Favorite, then being in Delaware bay aforesaid, below low water mark, to wit, on the high seas within the jurisdiction of this court, was then and there entered, and the said ship and cargo on board of the said ship, consisting of foreign goods and merchandise aforesaid, then and there taken possession of by John Weir, John McMain, William West, Thomas Howard, John Baily, Arthur West, James Rowland, Elisha Riecard, Peter, a black man, otherwise called negro Pet, George, a black man, otherwise called negro George, William West, the younger, Thomas Rodney, William Edwards, Jacob Guner, Samuel Davis, David Seamott, a black man, Richard Buley, Martin Hargis, Henry Buly, ——— Purnell, Daniel Rodney, John Parker, Daniel Woolf, John West, Simon Mariner, John McCracken, Isaac Turner, Samuel C. Thompson, William Marshall, David Johnson, Manuel, a black man, otherwise called black Manuel, John Driskill, Martin Barry, Simon Edwards, the younger, Samuel Thompson, Barly Art, Simon Edwards, Isaiah, a black man, otherwise called Isaiah, Richard Westly, William Edwards, James Rowland, Samuel Marshall, Henry Maull, Hamilton Bull, Joseph Milly, Cook Clampet, John Saunders, and Richard Howard, all of Sussex county, in the State of Delaware.

And your petitioners and libellants further show and allege, that Henry Berry, mate of the ship aforesaid, after leaving the said ship as aforesaid, procured at Cape May aforesaid, to wit: on the twenty-ninth day of October aforesaid, a shallop, and proceeded with the said shallop, having three of the mariners belonging to the said ship on board, to the place where the said ship then lay aground, in Delaware bay aforesaid, on a shoal called the Sheers. That, on approaching the said ship in the shal-

lop aforesaid, the said Henry Berry quitted the same shallop, and went on board the said ship there, in a small boat, with the intent and design to save the said ship and cargo; nevertheless, the said John Weir, and the said other persons, last herein before named, then and there being on board the said ship, then and there refused to permit, and actually prevented, the said Henry Berry, and the said mariners accompanying him as aforesaid, from attempting to save or saving the ship, and cargo on board her as aforesaid, or any part thereof; but forced and compelled the said Henry Berry, and the same mariners, then and there to leave the said ship forthwith, and then and there kept and continued in possession of the said ship, and the cargo on board her as aforesaid.

And your petitioners and libellants further show and allege, that the said John Weir, and the said other persons herein before named, and stated to be of Sussex county aforesaid, took, and unladed the said cargo, consisting of the said goods, wares, and merchandise, on said twenty-ninth day of October, and on divers other days then next ensuing, at Lewistown, in Sussex county aforesaid, and there embezzled parcel, and stored, kept, and detained other parcels of the said goods, wares, and merchandise, under color and pretence of a claim of salvage therefor.

And your petitioners and libellants further show and allege, that, willing to remunerate the same before named persons for such services as might have been done and performed by them touching the unlading, landing, and storing the said goods, wares, and merchandise, your petitioners and libellants, on the —— day of November, eighteen hundred and four, at Lewistown aforesaid, offered to pay to the same before named persons the sum of four thousand dollars, by way of and as a reasonable and liberal recompense and satisfaction for the services performed by them as aforesaid, in unlading from on board the said ship, landing, and storing the said goods, wares, and merchandise at Lewistown aforesaid.

And your petitioners and libellants further show and allege, that they, thereupon, then and there demanded and required from the same before named persons, the delivery of the possession of the same goods, wares, and merchandise, to your petitioners and libellants, to whom the same before named persons, then and there altogether refused to deliver the same goods, wares, and merchandise; and then and there rejected the said offer to pay, and refused to receive the said sum of money from your petitioners and libellants as a recompense and satisfaction for the services aforesaid; at the same time demanding from your petitioners and libellants an exorbitant sum of money, equal to one half part of the value of the said goods, wares, and merchandise, and upwards.

And your petitioners and libellants further show and allege, that they refused to pay the same last mentioned sum of money to the same before named persons, deeming the said sum of money an unreasonable claim for salvage of the same goods, wares, and merchandise, under the circumstances aforesaid, and contrary to the laws, usages, and customs in that behalf provided, used, and approved.

And your petitioners and libellants further show and allege that the same before named persons, having detained, and yet detaining, possession of the said goods, wares, and merchandise, without taking any legal measures to have the account of salvage aforesaid adjusted, and hence a right having attached in your petitioners and libellants, as the owners and shippers aforesaid, to call the same before named persons to adjudication in this court touching and concerning the claim of salvage aforesaid, your petitioners and libellants therefore pray that right and justice may be done in the premises, and your honor's order and decree therein; for which end, your petitioners and libellants pray the process of all attachment, arrest, and monition to the same before named persons claiming as salvors aforesaid, to proceed to adjudication touching and concerning the claim of salvage aforesaid; or, in default thereof, that the said goods, wares, and merchandise be restored to your petitioners and libellants as the owners and shippers thereof, and as in like cases is used and accustomed.

And your petitioners and libellants, &c.

G. READ,
Proctor for petitioners and libellants.

At which time, James A. Bayard, Nicholas Van Dyke, and James M. Brown are admitted proctors for John Weir, John McMain, William West, John Bailey, William West, the younger, William Edwards, Richard Beeby, Martin Harges, Henry, otherwise called Harriss Beeby, ——— Purnell, Daniel Rodney, John Parker, Daniel Woolf, John West, Simon Mariner, John McCracken, Isaac Turner, Samuel Thompson, William Marshall, David Johnson, Simon Edwards, Samuel Thompson, Baily Art, Samuel Marshall, Hamilton Hall, Joseph Milby, Cook Clampitt, John Saunders, who claim one moiety of the goods, wares, and merchandise mentioned in the libel before mentioned as salvage for their services, peril, and expenses in saving the same, and tendered a bond to respond the costs, which is approved by the court.

J. A. Bayard,
Ns. Van Dyke,
James M. Brown.

And now, to wit: this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and five, all and every of the proceedings therefor being first searched, weighed, and examined, his honor, the judge, doth pronounce and decree that the salvors shall receive one moiety or half part of the amount of the moneys arising upon the sales made by order of the court; and also one moiety or half part of the value of the goods remaining unsold, as per the estimate made by the appraisers appointed by the court, deducting therefrom the duties due by law to the United States upon the whole of the goods, sold and unsold; and that the residue of the moneys arising upon the goods sold, and the whole of the goods unsold, be delivered to the libellants, after complying with the limitations above expressed.

Whereupon, the attorney aforesaid, on the twenty-seventh day of May, A. D. 1806, on the behalf of the libellants, prayed that an appeal might be entered from the decree aforesaid, agreeably to the act of Congress in such case made and provided, which was accordingly granted by the court.

At a special session of the district court of the United States of America, in and for the Delaware district, holden at Newcastle, in the same district, on the tenth day of February, in the year of our Lord one thousand eight hundred and nine:

DELAWARE DISTRICT, *ss:*

George Read, attorney of the United States of America, in and for the Delaware district aforesaid, who, for the said United States, in this behalf, prosecutes, comes here into the district aforesaid, in his proper person, the tenth day of February, in the year of our Lord one thousand eight hundred and nine, at Newcastle, in the said district, at a special district court of the said United States, then and there holden in and for the said district, and on behalf of the said United States, gives the court here to understand and be informed that Allan McLane, esquire, collector of the revenue of the said United States, in and for the said district, on the fifth day of January, in the year of our Lord one thousand eight hundred and nine, at the said district, to wit: at the port of Newcastle, in the same district, on waters navigable from the sea by vessels, of ten or more tons burden, did seize, as forfeited to the said United States, a certain schooner called the "Fly," her tackle, apparel and furniture, and the cargo then and there on board the said schooner. For that the said schooner called the Fly, of the burden of one hundred and five tons and eighty-five ninety-fifths of a ton, owned by a person or persons to the said attorney unknown, departed from the port of Bordentown, in the district of Burlington, and State of New Jersey, on or about the twentieth day of December, in the year of our Lord one thousand eight hundred and eight, having then and there on board a cargo consisting of the following goods, wares and merchandise, that is to say: three hundred and fifty-six barrels of flour, fifty-two barrels of pork, three hundred and seventy-eight boxes of vermicelli, two hundred and one kegs of lard, one hundred and forty-three boxes of Bologna sausages, eight kegs and two barrels of butter, two hundred and ninety-five hams, forty-five fowls, one tub of butter, three hundred and forty ropes of onions, one box of mould candles, six barrels of apples and thirty-two cheeses, two iron twelve pound carronades, two iron short six-pounders, two iron swivels, two brass swivels, two hundred and seventy feet of plank, of foreign and domestic growth, produce and manufacture, being of great value, that is to say, of the value of five thousand one hundred and twenty-four dollars, lawful money of the said United States and upwards, for another port or district of the said United States, adjacent to the territories, provinces or colonies of a foreign nation, to wit: to the port of St. Mary's, in the district of St. Mary's, and State of Georgia, being a port in the district of the United States, adjacent to the Spanish

colony or province of east Florida, in North America, and part of the dominions of the King of Spain and the Indies, there and proceeded to the said port of Saint Mary's, in the said district of St. Mary's, and State of Georgia aforesaid, adjacent to the Spanish colony or province of east Florida aforesaid, contrary to the provisions of the act of Congress: "An act in addition to the act entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States, and the several acts supplementary thereto, and for other purposes." By reason whereof, the said schooner called the "Fly," her tackle, apparel and furniture, with her cargo aforesaid, became and is forfeited to the said United States.

Wherefore the said attorny for the United States, prosecuting as aforesaid, prays in behalf of the said United States the consideration of the court here in the premises, and that process thereof may issue to cite and admonish all persons whom it doth or may concern to appear at the next court day to show, &c., if &c., why the said schooner, called the "Fly," her tackel, apparel and furniture aforesaid, with her cargo aforesaid, seized as aforesaid, should not by a decree of this court be condemned as forfeited and sold, and the moneys, &c., be adjudged to the said United States, and as to law shall appertain. And the said attorney of the said United States, who prosecutes for the said United States in this behalf, gives the court here further to understand and be informed, that Allan McLane, esq., collector aforesaid, on the same day and year aforesaid, at the Delaware district, first aforesaid, to wit: at the port of New Castle, in the same district, on waters navigable from the sea, by vessels of ten or more tons burden, did seize and forfeit to the said United States a certain other schooner called the Fly, her tackle, apparel and furniture, and other the cargo then and there on board the said schooner. For that the said other schooner called the "Fly," of the burden of one hundred and five tons and eighty-five ninety-fifths of a ton, owned by a person or persons to the said attorney unknown, departed from the port of Bordentown, in the district of Burlington aforesaid, on or about the twentieth day of December, in the year eighteen hundred and eight, aforesaid, having then and there a certain other cargo on board consisting of the following goods, wares, and merchandise, that is to say: other three hundred and fifty-six barrels of flour, other fifty-two barrels of pork, other three hundred and seventy-eight boxes of vermicelli, other two hundred and one kegs of lard, other one hundred and forty-three boxes of Bologna sausages, other eight kegs and two barrels of butter, other two hundred and nine-five hams, other forty-five fowls, other one tub of butter, other three hundred and forty ropes of onions, other one box of mould candles, other six barrels of apples, other thirty-two cheese, other two iron twelve pound carronades, other two iron six-pounders, other two iron swivels, other two brass swivels, and two hundred and seventy feet of plank, of foreign and domestic growth, produce, and manufacture, being of great value, that is to say of the value of other five thousand one hundred and twenty-four dollars, lawful money of the

said United States, and upwards, for another port or district of the said United States, adjacent to the territories, provinces, or colonies of a foreign nation, to wit, to the port of St. Mary's, in the district of St. Mary's, and State of Georgia, being a port and district of the United States adjacent to the Spanish colony or province of East Florida, in North America, and part of the dominions of the king of Spain and the Indies there, and proceeded to the said port of St. Mary's, in the district of Georgia, adjacent to the Spanish colony or province of East Florida aforesaid, not being furnished with a clearance, pursuant to the special permission of the President of the United States, contrary to the act of Congress entitled as herein before mentioned and set forth.

Wherefore the said attorney for the said United States, prosecuting as aforesaid, prays, in behalf of the said United States, the consideration of the court here in the premises, and that process thereof may issue to cite and admonish all persons whom it doth or may concern to appear at the next court day, to show, &c., if, &c., why the said other schooner, called the "Fly," her tackle, apparel, and furniture aforesaid, with her cargo aforesaid, seized as aforesaid, should not, by a decree of this court, be considered as forfeited and sold, and the moneys, &c., be adjudged to the said United States, and as to law shall appertain, &c.

And the said attorney of the said United States, who prosecutes for the said United States in this behalf, gives the court here further to understand and be informed that Allan McLane, esquire, collector aforesaid, on the same day and year aforesaid, at the Delaware district aforesaid, to wit, at the port of Newcastle, in the same district, on waters navigable from the sea by vessels of ten or more tons burden, did seize, as forfeited to the said United States, a certain other schooner, called the Fly, her tackle, apparel, and furniture, and other the cargo then and there on board the said schooner, for that the said other schooner, called the Fly, of the burden of one hundred and five tons and eighty-five ninety-fifths parts of a ton, owned by a person or persons to the said attorney unknown, departed from the port of Bordentown, in the district of Burlington aforesaid, on or about the twentieth day of December, in the year eighteen hundred and eight aforesaid, having then and there a certain other cargo on board, consisting of the following other goods, wares, and merchandise, that is to say: other three hundred and fifty-six barrels of flour, other fifty-two barrels of pork, other three hundred and seventy-eight boxes of vermicelli, other two hundred and one kegs of lard, other one hundred and forty-three boxes of Bologna sausages, other eight kegs and two barrels of butter, other two hundred and ninety-five hams, other forty-five jowls, other one tub of butter, other three hundred and forty ropes of onions, other one box of mould candles, other six barrels of apples, and other thirty-two cheese, other two iron twelve-pound carronades, other two iron six-pounders, other two iron swivels, other two brass swivels, and other two hundred and seventy feet of plank, of foreign and domestic growth, produce, and manufacture, being of great value, that is to say, of the value

of other five thousand one hundred and twenty-four dollars, money aforesaid, and upwards, for another port or district of the United States adjacent to the territories, provinces, or colonies of a foreign nation, to wit, to the port of St. Mary's, in the district of St. Mary's, and State of Georgia aforesaid, being a port or district of the said United States adjacent to the Spanish colony or province of East Florida, in North America, and part of the dominions of the king of Spain and the Indies there, and proceeded on the voyage to the said port of St. Mary's, in the district of St. Mary's, and State of Georgia, adjacent to the Spanish colony or province of East Florida aforesaid, not being furnished with a clearance pursuant to the special permission of the President of the United States, contrary to the act of Congress aforesaid, entitled as herein before mentioned and set forth.

Wherefore the said attorney for the said United States, prosecuting as aforesaid, prays in behalf of the said United States the consideration of the court here in the premises, and that process thereof may issue to cite and admonish all persons whom it doth or may concern, to appear at the next court day, to show, &c., if, &c., why the said other schooner called the "Fly," her tackle, apparel, and furniture aforesaid, with her cargo aforesaid, seized as aforesaid, should not, by a decree of this court, be considered as forfeited, and sold, and the moneys, &c., be adjudged to the said United States, and as to law shall appertain, &c.; and the said attorney of the said United States, who prosecutes for the said United States in this behalf, gives the court here further to understand and be informed, that Allan McLane, esquire, collector aforesaid, on the same day and year aforesaid, at the district aforesaid, to wit, at the port of Newcastle, in the same district, on waters navigable from the sea by vessels of ten or more tons burden, did seize, as forfeited to the United States, a certain other schooner called the "Fly," her tackle, apparel, and furniture, and other the cargo then and there on board the said other schooner. For that the said other schooner called the "Fly," of the burden of one hundred and five tons and eighty-five ninety-fifths part of a ton, not being a vessel whose employment then and before had been confined to the navigation of bays, sounds, rivers, and lakes within the jurisdiction of the United States, or a packet, ferryboat or vessel exempted from the obligation of giving any bond whatever, owned by a person or persons to the said attorney unknown, bound on a voyage to the port of St. Mary's, in the district of St. Mary's, and State of Georgia, aforesaid, did, on the twentieth day of December, eighteen hundred and eight, receive a clearance from a certain William Snowden, deputy collector at the port of Bordentown, in the same district of Burlington aforesaid, and did depart thence, under the color of said clearance, for the port of St. Mary's, in the district of St. Mary's, and State of Georgia aforesaid, having then and there on board a certain other cargo, consisting of divers other goods, wares, and merchandise, to wit, other three hundred and fifty-six barrels of flour, other fifty-two barrels of pork, other three hundred and seventy-eight boxes of

vermicelli, other two hundred and one kegs of lard, other one hundred and forty three boxes of Bologna sausages, other eight kegs and two barrels of butter, other two hundred and seventy-five hams, other forty-five jowls, other one tub of butter, other three hundred and forty ropes of onions, other one box of mould candles, other six barrels of apples, and other thirty-two cheese, other two iron twelve-pound carronades, other two iron six-pounders, other two iron swivels, other two brass swivels, and other two hundred and seventy feet of plank, of foreign and domestic growth, produce, and manufacture, being of great value, that is to say, of the value of other five thousand one hundred and twenty-five dollars, money aforesaid, and upwards, laden on board the same other schooner before that time, to wit, at divers days and times in and about the same month of December, the lading of which same cargo on board the same other schooner was not then and there made under the inspection of the proper revenue officer or officers of the said United States in that behalf, subject to the same restrictions and regulations as are provided by the law for the inspection of goods, wares, and merchandise imported into the United States upon which duties are imposed, contrary to the act of Congress entitled as herein before mentioned and set forth.

Wherefore, the said attorney for the said United States, prosecuting as aforesaid, prays, in behalf of the said United States, the consideration of the court here in the premises, and that process thereof may issue to cite and admonish whom it doth or may concern, to appear at the next court day to show, &c., if, &c., why the said other schooner called the Fly, her tackle, apparel and furniture aforesaid, with her cargo aforesaid, seized as forfeited, should not, by a decree of this court, be condemned as forfeitd, and sold, and the moneys, &c., be adjudged to the said United States, and as to law shall appertain, &c. And the said attorney of the said United States, who prosecutes for the said United States in this behalf, gives the court here further to understand and be informed that Allan McLane, esquire, collector of the Delaware district aforesaid, on the same day and year aforesaid, at the district aforesaid, to wit, at the port of Newcastle, in the same district, on waters navigable from the sea by vessels, of ten or more tons burden, did seize, as forfeited to the said United States, a certain other schooner called the Fly, her tackle, apparel and furniture, and other the cargo then and there on board the said schooner. For that the same other schooner called the Fly, of the burden of one hundred and five tons and eighty-five ninety-fifth parts of a ton, not being a vessel whose employment then and there had been confined to the navigation of bays, sounds, rivers and lakes, within the jurisdiction of the United States, or a packet, ferryboat or vessel exempted from the obligation of giving any bond whatever, owned by a person or persons to the said attorney unknown, bound on a voyage to the port of St. Mary's, in the district of St. Mary's, and State of Georgia aforesaid, did, on the twentieth day of December, eighteen hundred and eight aforesaid, receive a clearance from a certain William Snowden, deputy collector at the port of

Bordentown, in the same district of Burlington aforesaid, by the procuracy and contrivance of the owner and master of the same schooner, and owners and shippers of the said cargo on board, to the said attorney unknown, or some one of them, and did depart thence, under color of the said clearance, for the port of St. Mary's, in the district of St. Mary's, and State of Georgia aforesaid, having then and there a certain other cargo on board, consisting of divers goods, wares and merchandise, to wit: other three hundred and fifty-six barrels of flour, other fifty-two barrels of pork, other three hundred and seventy-eight boxes of vermicelli, other two hundred and one kegs of lard, other one hundred and forty-three boxes of Bologna sausages, other eight kegs and two barrels of butter, other two hundred and ninety-five hams, other forty-five jowls, other one tub of butter, other three hundred and forty ropes of onions, other one box of mould candles, other six barrels of apples and other thirty-two cheese, other two iron twelve-pound carronades, other two iron six-pounders, other two iron swivels, other two brass swivels and other two hundred and seventy feet of plank, of foreign and domestic growth, produce and manufacture, being of great value, that is to say, of the value of other five thousand one hundred and twenty-four dollars money aforesaid, and upwards, laden on board the same other schooner before that time, to wit, at divers days and times, in and about the same month of December, the lading of which same cargo on board the same other schooner was not then and there made under the inspection of the proper revenue officer or officers of the said United States in that behalf, subject to the same restrictions and regulations as are provided by the law for the inspection of goods, wares and merchandise imported into the United States, upon which duties are imposed, contrary to the act of Congress entitled as herein before mentioned and set forth.

Wherefore the said attorney of the said United States prays, in behalf of the said United States, the consideration of the court here in the premises, and that process thereof may issue to cite and admonish whom it doth or may concern to appear at the next court day, to show, &c., if, &c., why the said other schooner, called the Fly, her tackle, apparel, and furniture aforesaid, with her cargo aforesaid, seized as aforesaid, should not, by a decree of this court, be condemned as forfeited and sold, and the moneys, &c., be adjudged to the said United States, and as to law shall appertain, &c.

And the said attorney of the said United States, who prosecutes for the said United States, gives the court here further to understand and be informed that Allen McLane, esquire, collector aforesaid, on the same day and year aforesaid, at the Delaware district aforesaid, to wit, at the port of Newcastle, in the said district, on waters navigable from the sea by vessels of ten or more tons burden, did seize, as forfeited to the said United States, a certain other schooner, called the Fly, her tackle, apparel, and furniture, and the cargo then and there being in and on board the same schooner, and consisting of divers goods, wares, and merchandise, of foreign as well as domestic growth, produce, and manufacture, other than sea stores; for that the same other schooner, called the "Fly," of

the burden of one hundred and five tons and eighty-five ninety-fifth parts of a ton, owned by some person or persons to the said attorney unknown, not having been registered, and without being enrolled and licensed according to law, was, on a certain day or days between the twentieth day of December, eighteen hundred and eight, and the fifth day of January aforesaid, found trading between district and district of the said United States, that is to say, between the district of Burlington, in the State of New Jersey, and the district of St. Mary's, in the State of Georgia aforesaid, or between two other districts of the said United States, then and there having on board and being in part laden with divers articles, to wit, goods, wares, and merchandise, of foreign growth and manufacture, (other than sea stores,) being of great value, and in other part with goods the growth and manufacture of the United States, also of great value, belonging to the master, owner, and mariners of the said schooner, or some one or more of them, contrary to the act of Congress, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating."

Wherefore the said attorney of the said United States, prosecuting as aforesaid, prays, in behalf of the said United States, the consideration of the court here in the premises, and that the process thereof may issue to cite and admonish all persons whom it may or doth concern to appear at the next court day, to show, &c., if, &c., why the said schooner, called the "Fly," her tackle, apparel, and furniture aforesaid, and the lading found on board the same schooner as aforesaid, being divers articles, consisting of goods, wares, and merchandise, of foreign growth and manufacture, other than sea stores aforesaid, and also goods the growth and manufacture of the said United States as aforesaid, of great value as aforesaid, seized as aforesaid, should not, by a decree of this court, be condemned as forfeited, and sold, and the moneys, &c., be adjudged to the said United States, and as to law shall appertain.

G. READ,
Attorney of the U. S. for the Delaware district.

And now, to wit, this 7th day of April, 1809, John B. Sartou, by his proctors aforesaid, prays that the schooner "Fly," her tackle and apparel, and all and singular the goods, wares, and merchandise mentioned and set forth in his claim, may be delivered to him upon his giving the security directed by the act of Congress in such case made and provided. And, it being agreed by the counsel on both sides, upon full information that the said vessel, her tackle and apparel, and the said goods, wares, and merchandise mentioned and included in the said claim are of the value of three thousand dollars; and it being therefore agreed that an appraisement of the same be dispensed with, and there being no duties, as the case exists, payable upon the property contained in the said claim, and William Hemphill, of the borough of Wilmington, merchant, being offered as security for the purpose aforesaid, and being approved of by the court, it is ordered by the court that,

upon the said claimant and the said William Hemphill giving bond in the usual form to the United States, conditioned for the payment of the said sum of $3,000 within four months from the time of rendering the judgment of the court, in case the said articles contained in the said claim shall, by the consideration and decree of this court, be condemned as forfeited in manner set forth and claimed in the libel, that the said schooner "Fly," her tackle and apparel, and all and singular the goods, wares, and merchandise contained in his said claim, shall be forthwith restored to him.

And now, to wit, on the same day, the seventh day of April, A. D. 1809, this cause coming on to be heard before the honorable the judge of the said court, and all and singular the exhibits and matters having been seen and duly considered, his honor the judge doth order and decree that the said schooner "Fly," together with her tackle, apparel, and furniture, and the said goods, wares, and merchandise, as claimed by the said John B. Sarton, as mentioned in the libel before named, be condemned as forfeited, and distributed, agreeably to the act of Congress in such case made and provided. And as to the remaining part of the said schooner "Fly's" cargo of goods, wares, and merchandise not claimed, his honor, the judge, doth order and decree, that the same be condemned as forfeited, and that the same be sold by the marshal of the Delaware district to the highest bidder; and that the moneys arising upon such sales be distributed agreeably to the said act of Congress.

A bond for $3,000, with William Hemphill security with the said John B. Sarton, for the agreed value of the schooner and cargo as claimed, being the approved security to the United States; filed, April 8th, 1809.

At which time James A. Bayard, esquire, and Nicholas G. Williamson, esquire, are admitted proctors for John B. Sarton, who claims the schooner "Fly, her tackle, apparel, and furniture," and also the following goods, wares, and merchandise, to wit, "320 barrels of flour, 50 barrels of pork, 378 boxes of vermicelli, 178 kegs of lard, 143 boxes sausages, 10 kegs butter, 2,800 weight of hams, 45 jowls, 1 box of mould candles, 6 barrels of apples, 200 weight of cheese, 270 feet of plank;" suggested to be schooner "Fly," her tackle, &c., being part of the goods, wares, and merchandise found on board, as mentioned in the said libel before named, &c.

J. A. BAYARD,
Proctor for claimant.

Dated April 7, 1809.

Upon the petition and statement of facts of John B. Sarton, of Lamberton, New Jersey, merchant, dated January 30th, 1809, to the Secretary of the Treasury, the said John B. Sarton being the claimant of the schooner "Fly," her tackle, &c., and a part of her cargo, the Secretary of the Treasury decided not to remit to the said petitioner the penalty and forfeiture aforesaid, nor any part thereof; per his decision, filed March 7th, 1809.

At a special district court of the United States of America, in and for the Delaware district, holden at Dover, in the same district, on the —— day of March, in the year of our Lord, one thousand eight hundred and thirteen.

Delaware District, *ss.*

George Read, attorney of the United States of America, in and for Delaware district, who, for said United States in this behalf prosecutes, comes here into the district court aforesaid, in his proper person, this —— day of March, in the year of our Lord, one thousand eight hundred and thirteen, at Dover, in the same district at a special district court of the said United States in and for the same district there holden, the same day and year, and on behalf of the said United States gives the court here to understand, and be informed that Abraham Hargis, a person employed by Allan McLane, esq., collector of the said United States, to do the duties of a surveyer of the port near Lewistown, in the said district, in with the knowledge of Edmon Chapman, at the same time then being master of the said ship or vessel, and with intention to import the same articles, consisting of foreign goods, wares, and merchandise as aforesaid, into the United States aforesaid, or the territories thereof, contrary to true intent and meaning of the said acts of Congress, in that behalf made and provided. And the said attorney, prosecuting as aforesaid, further avers that the said goods, wares, and merchandise so as aforesaid put on board the said ship or vessel, with intention as aforesaid, to import the same goods, wares, and merchandises into the said United States, or the territories thereof, contrary to the prohibitions contained in the said acts of Congress in that behalf made and provided, were afterwards, to wit, on or about the twentieth day of February, in the year of our Lord one thousand eight hundred and thirteen, at the district aforesaid, actually, and in pursuance and execution of the said unlawful intention, imported into the said United States, and the said ship having arrived and entered the waters of the Delaware, in Delaware district aforesaid, from the said port of Liverpool, either directly or circuitously, or from some other foreign port or place, to wit, on or about the day and year last aforesaid, with the knowledge of the aforesaid Edmon Chapman, then and there master of the said ship or vessel, in and on board the same ship or vessel, which sailed from the same port of Liverpool, or some other foreign port or place aforesaid, a short time after the putting and lading the same goods, wares, and merchandise, in and on board the same ship or vessel, with the same goods, wares, and merchandise on board her. By reason whereof, and by force of the acts of Congress aforesaid, the said ship or vessel, called the Lydia, her tackle, apparel and furniture became, and are, forfeited as aforesaid. And the said attorney of the said United States gives the court here further to understand and be informed that the said Abraham Hargis, an officer of the revenue of the said United States, acting as surveyor and inspector as aforesaid, for the town aforesaid, seized as and for the Delaware district aforesaid, and inspec-

tor there before that time, to wit: on or about the twenty-third day of February, in the same year, at the same district, to wit: in the bay of Delaware aforesaid, in the same district, did seize on waters navigable from the sea, by vessels of ten or more tons burden, as and being forfeited to the said United States, a certain ship or vessel, called the Lydia, her tackle, apparel, and furniture, owned by a person or persons to the said attorney unknown.

For that, and the said attorney prosecuting as aforesaid, avers that the said ship or vessel called the Lydia, of the burthen of two hundred and thirty-four tons and upwards, whereof a certain Edmon Chapman was then and there and yet is master, being at the port of Liverpool, in Great Britain, or some other foreign port or ports, place and places, at some certain time or times after the second day of February, in the year of our Lord one thousand eight hundred and eleven, and after the fifteenth day of September, in the year of our Lord one thousand eight hundred and twelve, and before the twenty-sixth day of October, in the same year, certain articles, that is to say, certain goods, wares and merchandise, being in whole or in part of foreign growth, produce or manufacture, or of the growth, produce or manufacture of Great Britain and Ireland, or of the one or other of the colonies or dependencies of Great Pritain, or of the growth, produce or manufacture of some place or country in the actual possession of Great Britain, the importation whereof into the United States or the territories thereof, as well from any port or place in Great Britain or Ireland, or in any of the colonies and dependencies of Great Britain, as from any other foreign port or place whatever, is prohibited by the act of Congress in that behalf made and provided, were, during the times the said ship or vessel was at the port of Liverpool aforesaid, or at some other foreign port or ports, place or places, to wit, after the fifteenth day of September aforesaid, then actually put and ladened in and on board the same ship or vessel, and being forfeited to the said United States, and secured the said ship or vessel called the Lydia, her tackle, apparel and furniture; wherefore, the said attorney of the said United States, prosecuting as aforesaid, prays, in behalf of the said United States, the consideration of the court here in the premises, and that process thereof may issue to arrest and attach the same ship or vessel, her tackle, apparel and furniture, and to cite and admonish all persons whom it doth or may concern to appear at the next court, to show, &c., if, &c., why the same ship or vessel, her tackle, apparel and furniture, should not, by a decree of this court, be condemned as forfeited, and sold, and the moneys, &c., be adjudged to the said United States, and as to law shall appertain.

G. READ,
Attorney of the U. S. for Delaware district.

To the honorable John Fisher, esquire, judge of the district court of the United States in and for Delaware district:

The libel of James Thompson, George Westly, Jacob Conwell, Samuel Davis, Henry Maull, Richard Westly, junior, Nathaniel Newnam, and Solomon Jacobs, all of Sussex county, in the said district, principal salvors of the ship Lydia, tackle, apparel, and furniture, and her cargo, for themselves and other salvors of an inferior degree of merit,

Respectfully showeth:

That, on the morning of the twenty-first day of February last past, the said James Thompson and others of the libellants descried, from the beach near Lewistown, in the said county, a ship just within the capes of Delaware, having a flag flying at her mast head, which they took to be a signal for a pilot; that, in consequence, the before named libellants immediately put off from the shore aforesaid in a whale boat, and rowed themselves towards the said ship, when, after having proceeded upwards of a mile in the bay of Delaware, they met the captain, Edmund Chapman, and crew of the said ship coming on shore from her in the ship's long boat; that being informed, in answer to his inquiry then made of the said libellants, that they were going on board the said ship, he replied that she was the ship Lydia; that it would be needless as well as dangerous for them to go on board the said ship; that he had but a short time before left her, bringing his crew with him, and had been obliged that morning to cut his cables and heave her to under his mizen stay-sail; that the said ship was, when he left her, half full of water, and would inevitably sink, in which case it would be dangerous for the boat to be alongside, as it would be carried down by the suction that must be occasioned by the sinking of the ship, and so be lost; that the said libellants before named, notwithstanding the great risk and danger they would incur in going alongside of the said ship in their said boat, as represented to them by the said Chapman, who, at the same time, informed the said libellants that he, with his crew, had abandoned the said ship Lydia, her tackle, apparel, and furniture, and cargo then on board, he considering that it was utterly unsafe for any persons to remain, unless at the hazard of their lives, on board the said ship, she being rotten, decayed, and worm-eaten; that the said libellants, however, proceeded towards and arrived alongside the said ship at the distance of upwards of six miles from the place where they had met the said long boat; that it being the day ensuing the night of the great storm, although the wind had somewhat abated, there were heavy rolling swells in the bay, and the approach to the ship with their boat was attended with considerable danger; that, on boarding the said ship, they found the two cables cut on the windlass and hanging through the hawser holes, and the ship was, in other respects, in very bad condition; that, at the time they boarded the said ship, she was near the ships' channel in the bay, and within half a mile of the fork of the shoal called the sheers, to which she

had been driven from her anchorage in twenty fathoms, and not being then far from the mouth of the bay, was driving, with a strong wind north northwest and ebb tide, very rapidly out to sea, whither, if she had been at that time carried, she and the cargo on board her must have been totally and inevitably lost.

That by using great labor in pumping her, and so freeing her from the water she had made owing to her leaking, and much exertion, skill and management in navigating the said ship, and in a situation of extreme peril and exposure on their part, they brought the said ship on the bay shore abreast of Pilot town, where they were obliged to lay her aground, she having no anchors or sufficient cables. That, apprehensive lest a storm might arise while the said ship lay in that situation, it was deemed to be essential that at least a part of the cargo on board should be promptly unladen, so that by lightening the said ship she could be safely removed to some port on the waters of the Delaware. That, in order to expedite the unlading, it became essential to employ numerous hands, lighters and teams; and thus prepared, went to work, the day after being Monday, and continued assiduously employed until the ensuing Saturday, the twenty-seventh day of February last past, and landed and stored about four thousand bushels of salt from on board the said ship, being a part of her cargo, and about one-half the quantity of salt that had been laden on board her. That this operation induced necessarily an expense of about twelve hundred dollars, which the said libellants became responsible for at Lewistown. That the said ship being much lightened and eased by the discharge of this portion of her cargo aforesaid, the libellants were enabled to get her afloat and removed thence up the said bay and river to the port of Wilmington, in a state of safety, with the remainder of her said cargo on board. That, in order to remove the said ship to the said port of Wilmington, the said libellants were obliged to hire anchor and cable at considerable expense, and incur other heavy charges to the amount of about five hundred dollars. That the cargo on board the said ship consisted of about eight thousand bushels of salt, several hundred tons of coal, and a quantity of meats; and the said libellants represent that the value of the said ship, her tackle, apparel and furniture, and cargo on board on her first arrival in Delaware bay aforesaid, is estimated at ten thousand dollars and upwards, lawful money of the United States. Now, inasmuch as the said libellants have, with so much difficulty, exposure, personal risk and expense, saved the said ship and cargo, which otherwise, in all human probability, would have been totally lost, having been abandoned by the master and crew belonging to her, therefore, the said libellants pray the process of this court to issue to attach and seize the said ship, her tackle, apparel and furniture, and the cargo, as well that part thereof which was unladen as aforesaid, as that part thereof which remained on board the ship; and that the said ship, her tackle, apparel and furniture, and cargo aforesaid, by your definitive sentence may be condemned and sold, and that an adequate and reasonable portion may be awarded to the said libellants and others as aforesaid, for their labor, peril and expense in the premises, as

shall be found due to them according to law and right, and that such further and other decree may be made by your honor touching the premises as may appertain and belong to them to demand and have in such case. And the said libellants further pray, on behalf of themselves and others, that monition issue to all persons concerned to show cause, if any they have, why an adequate and reasonable salvage should not be decreed thereout to the said libellants on behalf of themselves and others; and that such further and other steps shall be taken as the course of this court shall require.

JAMES THOMPSON,
In behalf of himself, the rest of the Libellants before named, and others.

GEO. READ,
Proctor for libellants.

And now, to wit, this seventeenth day of April, eighteen hundred and thirteen, this cause coming on to be heard, and, it appearing to his honor, the judge, upon the circumstances admitted by the parties, libellants and claimants respectively, touching the matter of salvage stated in the said libel, that the property in question was saved from great peril, it is therefore ordered and decreed by his honor, the judge, the sum of seventeen hundred dollars be allowed, and is hereby adjudged and decreed as, and for, salvage in the matter of the said libel, and that the same be paid by the said claimants to the said James Thompson, for himself and the said other libellants in the said cause, together with the costs of this suit, from which decree the said parties, libellants and claimants repectively, stipulate and agree in the presence of his honor, the judge, that no appeal shall be taken, the same decree being made by consent of the said parties.

JOHN FISHER.

DISTRICT OF DELAWARE, *ss.*

The United States, *vs.* The cargo of the ship Lydia. } *Libel filed, &c.*

And now, to wit, this fourteenth day of March, A. D. 1813, E. Chapman appears gratis by his proctors, J. A. Bayard and Louis McLane, and claims the said cargo of the ship Lydia, mentioned in the libels aforesaid as the property of the said E. Chapman, and tenders bond to respond the costs, &c.

And, by the said proctors, the said E. Chapman prays that the said cargo may, by an order of this court, be delivered to the said claimant upon a reasonable valuation, upon his giving bond for the amount thereof, according to the provisions of the act of Congress and the practice in such cases observed.

J. A. BAYARD,
L. McLANE.

District of Delaware, *ss.*

The United States, *vs.* The ship Lydia, her tackle, apparel, and furniture. } *Libel filed, &c.*

And now, to wit, this fourteenth day of March, A. D. 1813, E. Chapman appears gratis, by his proctors, J. A. Bayard and Louis McLane, and claims the said ship Lydia, her tackle, apparel, and furniture mentioned in the libel aforesaid, as the property of the said E. Chapman, and tenders bond to respond the costs.

And, by his said proctors, the said E. Chapman prays that the said ship, and may, by an order of this court, be delivered to the said claimant upon a reasonable valuation, upon his giving bond for the amount thereof, according to the provisions of the act of Congress, and the practice in such cases observed.

J. A. BAYARD,
L. McLANE.

United States of America, *Delaware District*, } *ss.*

I, Thomas Booth Roberts, clerk of the district court of the United States for the Delaware district aforesaid, do certify, that the foregoing pages contain true copies of libels, &c., on record in my office, and also extracts from the records in said cases.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, at Wilmington, the eighth day of November, in the year of our Lord one thousand eight hundred and forty-seven.

T. BOOTH ROBERTS,
Clerk Dist. court, U. S. for Del. Dist.

In the matter of the title to the Pea Patch island, before the Hon. John Sergeant, arbitrator, November 27 and 29, 1847.

Argument of James A. Bayard, of Delaware, on behalf of the United States:

With submission to your honor:

This, I believe, is the most appropriate title by which to address you, because, though not a judge of a court of general jurisdiction, you are the judge of a court of special jurisdiction, and that without appeal. That jurisdiction extends, too, over a case similar, in this respect, to one which, nearly a century ago, (when the colonies, which are now States, were, in population, wealth, and power, insignificant compared with their present advancement,) Lord Hardwicke declared to be worthy the judicature of a Roman senate.

The case involves a decision on the territorial limits of two sovereign States, and one of the parties whose rights that decision will finally conclude is the government of the country of which you are but a private citizen. The trust, therefore, is one of high magnitude; but it has been willingly created by both parties, with the most undoubting confidence in the competency and impartiality of the tribunal by whose judgment they have agreed to abide. It is proper, before proceeding in the statement of facts and discussion of the questions of law, upon the decision of which I suppose your award must rest, that I should, in justice to the government, state succinctly the history of the claim to the Pea Patch island. In May, 1813, Delaware ceded the island to the United States, upon condition that fortifications were erected and maintained there. In December, 1814, the United States took possession, embanked the island, built wharves, erected a fort, and retained the exclusive possession till 1838. The possession of the island was taken peaceably, as is shown by the officer in command, Captain Clarke; no vestige of any building and no inhabitants, except crows, being found there. The alleged previous possession of Dr. Gale, if proved, is immaterial; for all that is attempted to be shown is that he went upon the island in the spring or summer of 1813, erected a small fishing hut without windows or chimneys, and had a fishery there during that season, and perhaps, though not certainly, the following one. The hut, however, had disappeared, either removed by him or swept away by the tides, which, when very high, overflowed the whole island; and, at all events, he had no possession when Captain Clarke commenced embanking for the government, and erecting temporary works in December, 1814, nor did he ever come there to claim possession whilst that officer remained, a period of near three years. The first notice we have of claim, is in 1818 or 1819, when an action of ejectment was brought by the lessee of Henry Gale, against Captain Babcock, the officer then in command and superintending the construction of the works. The then administration, (Mr. Monroe's,) immediately referred the case to the

district attorney of Delaware, though the suit was brought in New Jersey, and his opinion being in favor of the validity of the Delaware title, instructions were given to the district attorney of New Jersey to defend the action, and counsel were specially retained on behalf of the United States, Richard Stockton, esq., of New Jersey, and Cæsar A. Rodney, of Delaware. The case was noticed for trial, but, after remaining in the circuit court for the New Jersey district till 1822, it was discontinued or abandoned in that year. The fort was subsequently finished, and destroyed by fire, I believe, in 1831. No further claim appears among the papers, or has been shown, until 1831. When one of the claimant's present counsel, then Secretary of War, (having arrived at the conclusion that the Delaware title was invalid,) made a conditional contract with the agent of the claimant for the purchase of his title. This contract Congress declined ratifying. Dr. Gale being dead, the then claimant brought an action of ejectment in the circuit court for the New Jersey district in 1833. In the meantime, the claimant, doubting the validity of his title even, if the island was within the limits of New Jersey, in November, 1831, had procured a gratuitous cession by that State by an act of the legislature, passed November 24, 1831. When this second suit was brought, the course of the existing administration, in reference to the claim, was characterized by the grossest neglect of the interest of the United States. In stating this, I refer to no particular individual, for I know not who should be considered responsible for the neglect, but it probably arose from being divisible. The United States had accepted her title from Delaware, and it would seem that when that title was attacked, the course taken by the government on the former occasion would have been the proper course. No reference, however, was made by the government to any officer in Delaware, nor to the State, for the muniments of her title. The defence was left without any aid afforded by the government to the district attorney of New Jersey as part of his official duty. It was tried before Judge Baldwin, in 1836, without a single witness on the part of the United States, and with no other evidence than the two printed copies of the duke of York's deeds of feoffment to Wm. Penn, to be found in the appendix to the first volume of the Delaware laws. A verdict and judgment were rendered in favor of the claimant; and, in 1838, under a written arrangement with the workmen residing on the island, the claimant went into possession. In 1839, Congress, not being satisfied with this decision, directed a further judicial examination should be had. In May, 1839, an ejectment was brought into the circuit court of the United States for the Delaware district by the United States, and, no defence being made, judgment was, upon affidavit, rendered for the United States by default against the casual ejector. No arrangement for a further hearing, according to the directions of Congress, was effected for some length of time, owing to a difference of opinion between the Solicitor of the Treasury and the counsel of the claimant as to the proper mode of rehearing the case. An agreement was, however, entered into, in 1842, between the Secretary of War and the claimant for a decision

of the title by arbitration. The claimant failed to proceed under this agreement; and, in 1843, the government issued a *si. fa.* on the judgment recovered in Delaware, and, on the judgment rendered (there being no defence) on that writ, an *hab. fa. poss.* was issued, and the possession delivered to the United States by the marshal of the Delaware district, who have been since and now are in possession of the island. I have stated this, trusting to show that there has yet been no fair trial of this claim on the merits. In the suit in Delaware, the claimant would not appear, though an offer was made to open the judgment; and in the suit in New Jersey, the title of Delaware was not in evidence, and no one acquainted with that title was there to defend it. The loosest depositions were admitted on the part of the claimant, and not a single witness examined on behalf of the United States. We have come now to the last act of the drama; and before you, sir, both parties have had a full presentation of their title, and we are willing to abide the issue.

Before stating the facts, it is necessary to ascertain what the question is which is submitted for your determination; and the better to understand what the case before you is, I shall show, first, what it is not. It is not a question of possession, but of title. The United States are to remain in possession in all events. They have the title of Delaware, and, if the decision sustains that title, the right of possession follows it as an incident. If the title is decided to be in claimant, under the State of New Jersey, the United States are still, by the agreement of reference, to retain the possession, paying for his title a sum to be ascertained by commissioners. The sole question submitted for your decision is, by the express terms of the agreement, the title of the United States, claiming under the cession from the State of Delaware, and the title of the claimant under the State of New Jersey. Unless, therefore, the alleged lease, as it is called, which we have produced under notice from the opposite counsel, affects the title of the United States, or gives title to the claimant, it is an irrelevant paper in this case. Its immateriality is ascertained the moment it is inspected. It is at best a mere agreement by certain workmen acknowledging themselves tenants at will of Dr. Hudson, from whom the claimant's title is deduced. If those workmen were the parties to this reference, and not the United States, and could show a better title than the claimant to the island, the lease would afford no obstacle to their recovery, for the tenancy at will is at an end; and it surely needs no argument to show that the title of the United States to the Pea Patch could not be impaired by any lease, either determined or still existing, entered into between those to whom the claimant is privy in estate, and a parcel of workmen in the employment of the government. Had the lease been to the Secretary of War, it would have no greater influence; for the title of the United States, if good, can be defeated only by a legal disposition of it under legislative action. A lease accepted by the President himself from the claimant, and the term being still undetermined,

would, without any action of Congress to authorise it, be equally nugatory, if the title is otherwise in the United States.

The sole question, therefore, is whether the Pea Patch island is within the territorial limits of Delaware, or of New Jersey.

There can be no doubt that since 1813 the title of Delaware has been vested in the United States, and the title of New Jersey since 1831 vested in those from whom the claimant's title is deduced.

What, then, are the facts upon which the titles of these two States depend?

From the documents produced in the cause, and the historical account of the early settlement of this country, it appears that the Dutch, after first making their great settlement on the North river about the year 1616, subsequently, about the year 1625, made a settlement on the Delaware, then called the South river, their principal settlement being at Newcastle, the name of which has been changed from Newcastle, or Fort Casimer, to that which it now bears. About 1632, the Swedes also made a settlement in Delaware, both on the Christiana, at Wilmington, and also at what was called by them Cape Paradise, and, afterwards, the Whorekills, and is now known as Lewistown, near Cape Henlopen. Many conflicts took place between the settlers of the two nations, but the Dutch remained in the ascendant, governing the country, and holding it as a dependency on their great settlement on the North river, at New York.

In 1664 the Dutch settlement at New York was surrendered to the English, and in the same year also the settlements on the South river. In 1672, the Dutch for a few months became again masters of the settlements, both on the North and South rivers, but they were re-taken shortly afterwards, and the title and right of Great Britain to the whole country, including the States of New York, New Jersey, Pennsylvania, and Delaware, admitted in the treaty between that nation and the States General, February 14, 1674; and the English retained the whole country from that time till the revolution of 1776, when thirteen colonies dissolved their allegiance to the British crown, and became sovereign and independent States.

Let us then trace the title of New Jersey under the British crown, and ascertain what were her territorial limits whilst she remained a colony.

March 12, 1664, King Charles II, granted, by patent, to the duke of York, "all that part of the main land, &c., together with the said river called Hudson's river, and all the lands from the west side of the Connecticut to the east side of Delaware bay; and also the islands called Martha's Vineyard and Nantucket, together with all the lands, islands, soil, rivers, royalties, &c., to the said several islands, lands, and premises belonging and appertaining, with their and every of their appurtenances." There is also a grant by the patent of the powers of government.—Patterson's New Jersey Laws, p. 1; Leam and Spicer, p. 3 and 4.

June 24, 1664, the duke of York conveyed that portion of the lands called New Jersey, from the west of Long Island to the Dela-

ware bay, to Berkley and Carteret; and under this grant the State of New Jersey was subsequently colonized.

In 1672 the Dutch re-took New Jersey, and the colonists swore allegiance to them.—Leam and Spicer, p. 50.

After the restoration of the country to England, June 29, 1674, Charles II. by letters patent, granted to the duke of York, New Jersey, by the same description as in the former patent, and with the same powers.—Leam and Spicer, p. 41.

This second patent was questionless executed to prevent any doubts arising as to the effect of the re-conquest by the Dutch in impairing the validity of the first patent. The colony was subsequently divided into East New Jersey and West New Jersey; East New Jersey became the property of Sir George Carteret, and West New Jersey was allotted to Edward Byllinge, William Penn, and others, as trustees.

August 6, 1680, the duke of York, by deed of confirmation reciting the previous grants, confirmed the moiety of Lord Berkley and others to the trustees in whom the title was then vested. This deed contains the following additional words: "And also the free use of all bays, rivers and waters leading into or lying between the said premises, or any of them, in the said parts of America, for navigation, free trade, fishing or otherwise."

The duke by a similar deed confirmed East Jersey to Carteret.

On the 23d of November, 1683, King Charles II. confirmed this deed to Carteret, *but there is no evidence of any such confirmation by King Charles of the deed of confirmation to the trustees of August* 6, 1680.

This closes the paper title of New Jersey, which is shown only by printed copies, no original grants or exemplified copies having been produced.

On April 15, 1702, the then proprietors of east and west New Jersey surrendered all the powers of government to Queen Anne, and the surrender was accepted April 17, 1702, and the powers of government remained from that time till the revolution of 1776, in the crown.

On the 4th of March, 1680, King Charles II. by patent granted the province of Pennsylvania to William Penn, described as bounded on the east by the Delaware river.

August 21, 1682, the duke of York by deed released to William Penn all claim or title to the said province.

On behalf of the United States, we have produced the original lease from the duke of York to William Penn for ten thousand years, dated August 21, 1682, for the land round Newcastle and the river, in the same language, as to description, as his subsequent deed of feoffment.

On the 24th of August, 1682, the duke of York executed two deeds of feoffment to William Penn, which have also been produced. The first deed granting the land round Newcastle and the river and islands, the description in the premises of which deed will be more particularly noticed hereafter. The second deed

granted the land from twelve miles south of Newcastle to the Whorekills.

Both these deeds contain covenants for further assurance by the duke to Penn. Livery of siezin of the premises was made secundum formam chartæ, and a copy of the record thereof has been produced from the records at Newcastle, duly certified.

We have also produced an exemplified copy, more than a century old, under the great seal of New York, of a confirmatory declaration of the then government of New York, made November 26, 1682, which, after reciting the deeds of feoffment from the duke to William Penn, and the livery of seizen by his attorney constituted in the deeds, enjoins all the magistrates and people within the premises granted to yield obedience to William Penn.

We have also produced the original charter from King Charles II. to the duke of York, dated March 22, 1683, granting to the duke the same premises conveyed by him in the deeds of feoffment to William Penn. This charter also granted the full powers of government and jurisdiction.

We have also produced two exemplified copies of this charter, one found among the records of Delaware, proved under oath before the lord mayor of London, more than a century ago. The second, exemplified under the great seal of England, from the Chapple of the Rolls. The original letters patent we have traced to the possession of Penn, as remaining among the muniments of title in the charter room of the Penn family, until it was, about ten years ago, delivered to John R. Coutes, of Philadelphia, by one of the Penns, who brought it to this country.

These are all the charters or deeds which constitute the respective titles of the two States, and define their territorial limits *as colonies*.

What, then, were the territorial boundaries of New Jersey as a colony under her charter? The grant is to the east side of Delaware bay. There is some little variance in the language of some of the grants, but they all are bounded by the Delaware bay and river. The language of the patent from King Charles II. is, "and all the lands from the west side of the Connecticut to the east side of Delaware bay."

Did this grant, or did the grant of the province of Pennsylvania to William Penn in March, 1680, include the river? The rule of the law of nations is, that where a nation takes possession of a country separated by a river from another nation, and it does not appear which had the prior possession of the river, they shall each extend to the middle of it; yet when the claim to the country is founded not on discovery, but *on grant*, the boundary on the river must depend upon the just construction of the grant, and the intention of the parties to be discovered from its face. This is the language of Judge Washington in Corfield *vs.* Coryell, 4 Wash., C. C. R., 384; and in that case he decided that the chartered limits of New Jersey did not include any part of the Delaware bay or river below low water mark. But this question has been settled by the Supreme Court of the United States, in Handley's lessee *vs.*

Anthony, 5 Wheat., 374. "When (says C. J. Marshall, delivering the opinion of the court,) a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created State extends to the river only. The river, however, is its boundary."

In this case, the crown of England was the proprietor of the whole country, and the grant to the duke of York was, by its terms, bounded by the river, and the river of course remained in the crown, the original proprietor.

But the grant in this case was a grant by the king to a subject, and we must look to the common law for the rules which govern the construction of the grant. The rule of common law is, whether the grant be by a subject to a subject, or by the crown to a subject, that a grant bounded by a river not navigable, extends ad filum aquæ; but on navigable streams, where the tide ebbs and flows, the grant extends only to high water mark. King *vs.* Smith, 2 Doug., 441; ex parte Jennings per Savage, C. J. C., Cow., 528; and the cases cited; 6. Cow., 536, note (*a.*)

This necessarily flows from the principle that, of common right, the shore between the high and low water mark of the sea, and the arms thereof, belongs to the crown, and though it may belong to a subject, yet it will not pass by implication, and without express and apt words of grant.—Hale de jure maris, 12, 13.

Being in the king prima facie, and of common right, it cannot pass by his grant without express words of grant, as nothing passes by a royal grant by general words, or by implication. The Banne Fishery, Davies R. 156, 157; not unless the intention be manifest that it should pass. Duke of Somerset *vs.* Fogwell, 5 B and C, 875, 886. United States *vs.* Arredando, et al., 6 Peters, 738–'39.

The Delaware river was not therefore included within the grant to the duke of York by King Charles, and independently of the rule of construction referred to, the intention is manifestly not to include the river, as the Hudson river in the patent is granted by express words of description, "together with the said river called Hudson's river."

In 1721, upon the application of the colonies of Pennsylvania and New Jersey, the opinion of Lord Hardwicke and Lord Raymond, then attorney and solicitor generals, was given as to the title to the Delaware river, and that opinion was clear and decisive that the river was not included either within the boundaries of the grant of New Jersey or of the province of Pennsylvania, but remained in the crown.—Chalm. Opinions, 59.

The opinion was confined to the two charters of New Jersey and Pennsylvania, and though the reasons are not given, it could have been based on no other principles than those which have been stated. The grants under which the title of Delaware is sustained were not before those officers, and the opinion has no relation to them. Delaware was at that time a distinct colony from Pennsyl-

vania, though belonging to the same proprietary. The *chartered* limits of New Jersey, therefore, whilst a colony, did not include the Delaware river or the islands therein. Nor could the *colony* acquire any right by prescription to the river, (if there were any facts to sustain such a prescription against the crown,) as the time up to 1683 (when the title of Pennsylvania accrued under the grants which embraced the colony of Delaware) was too short to give title by prescription.

The right then to the river Delaware in 1682, 1683, was not in the colony of New Jersey either by grant or prescription, but in the crown of England.

Was then the title and jurisdiction over the river in the colony of Delaware, by virtue of the deed of feoffment of the duke of York to William Penn, of August, 1682, and the subsequent grant by King Charles to the duke of York, on the 22d of March, 1683?

The first question, and perhaps the only question is, as to the validity of the duke's grant and the effect of the subsequent grant by the crown to him.

The second question, whether the grants if valid cover the river, its soil, and the islands within the twelve miles circle, seems too plain for argument; and were it not for the extraordinary opinion delivered by Judge Baldwin on the former trial of the title to this island, would require only that the description of the premises conveyed should be read.

First. As to the validity of the grant by the duke of York to William Penn.

The duke of York, after the surrender by the Dutch both of the settlements on the North river and on the South river to his officers in 1664, claimed and governed the now State of Delaware, as a dependency upon the province of New York, until he made the grant to Penn in 1682. Private grants of land were made, both by Nicholls and Andross, the duke's governors of New York, which have always been recognized as valid in Delaware. Courts were established, and the powers of government exercised over the country as fully as if he had received a grant from the crown. With the full knowledge of these facts, the crown in 1672, made its second grant of New York to the duke of York. Were it necessary to rely upon a prescriptive title in the duke, it might well be contended that the facts of the case, and the subsequent peaceable possession of Penn under the deed of feoffment, would, in the course of years, undisturbed as he was by the crown, give a good title to the premises contained within the duke's grant. It is unnecessary, however, to press this view of the case.

The duke of York being in actual possession, on the 24th of August, 1682, by deed of feoffment, granted and conveyed to William Penn, his heirs and assigns, the following premises: "All that, the town of Newcastle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying, and being upon the river Delaware in America, and all the islands in the said river Delaware, and the said river and soil thereof, lying north of the southernmost part of the

said circle of twelve miles about the said town, together with all rents, services, royalties," &c.

This deed contains also a covenant for further assurance by the duke, and constitutes two joint and several attornies to make livery of seisin of the premises.

Livery of seisin was accordingly, in October, 1682, made by John Moll, one of the attornies of the duke, to William Penn, personally, "secundum formam chartæ," by handing him the key of the fort at Newcastle, into which Penn entered, also by the delivery of turf, twig, and fowl, and the soil of the river, and a porringer of river water.

By a second deed of feoffment dated on the same day as the first, the duke also conveyed to William Penn: "All that tract of land upon Delaware river and bay, beginning twelve miles south from the town of Newcastle, otherwise called Delaware, and extending south to the Whorekills, otherwise called Cape Henlopen, together with free and undisturbed use and passage into and out of all harbors, bays, waters, rivers, isles, and inlets, belonging to, or leading to the same."

This deed also contains a warrant for further assurance by the duke.

It contains also what is not found in the first deed, a covenant by Penn to account for and pay over to the Duke, his heirs, and assigns, one moiety of the rents, issues, and profits, of the premises conveyed.

Livery of seizin was also regularly made under this deed on the premises, according to the form of the grant.

On the 22d of March, 1683, King Charles II., by letters patent under the great seal, granted to the duke of York both the foregoing tracts, by a description *in and odidem verbis*, with this exception, that in the king's grant to the duke, in the description of the first tract these words are added, "lying between New Jersey and Maryland," rendering the description slightly more definite. In the grant by the crown both tracts are included in the same patent, and the full powers of government are also granted.

It is submitted, first; that the effect of these deeds by the duke of York to William Penn, and the subsequent charter by the crown to the duke was to pass the legal title to William Penn in the premises conveyed by the estoppel.

Or, secondly; that the duke, after the grant by the crown, held the premises as a trustee for William Penn, and under the covenant for further assurance, could, as a subject, be compelled to convey the legal estate. That, upon his ascent to the throne, he still held as a royal trustee, and the equitable estate was in Penn, in fee; and being in possession as cestui que trust, the estate, whether legal or equitable, made Penn the absolute owner of the premises intended by the king's grant to pass.

The legal title passed from the duke of York by estoppel to William Penn.

It may be admitted that in general the crown is not bound by estoppels in pleading, or arising out of its own acts. The distinc-

tion is, that no estoppel can arise from any grant or act of the king so as to bind the crown; but if the king acquires by descent, or otherwise, lands which are bound by estoppel as against the person under whom he claims, the estoppel will continue against the crown.

In the case of Penn *vs.* Lord Baltimore, 1 Vez. 453, Lord Hardwicke did not decide this question; but he says, "the question of estoppel is a nice consideration, and the duke was in a condition to be bound."

The principle is, that an estoppel, where it works on the interest in the land, runs with the land, and is a title. Trevivan *vs.* Lawrence, 1 Salk. 276; S. C. 6 Mod. 258; Palmer *vs.* Ekins, 2d Ld. Raym., 1551.

"Privies in estate as the feoffee, lessee, &c., shall be bound by, and take advantage of, estoppels. If A lease by indenture to B lands in which he has nothing, and afterwards A purchases in fee the same lands, and sells them to D and his heirs, D shall be estopped; *and where the estoppel works on the interest in the land, it runs with the land into whosesoever hands the land comes.*"

This is the second resolution in Palmer *vs.* Ekins; and its principle includes the crown as well as a subject, where the land comes to the crown bound by the estoppel. The effect, too, of an estoppel is different, where it is of a mere technical character, and where, as in this case, it is but an enforcement of a plain principle of right and justice.

That the estoppel bound the duke of York and his assignees whilst a subject, immediately after the grant by the crown, is beyond controversy; and on what principle or authority, *as it run with the land*, did it cease to affect the title when the duke ascended the throne? He held the land by grant, and not by prerogative; and it is only the prerogative right which is not affected or bound by estoppel. Earl of Hereford *vs.* Syley, 1 Ld. Raym., 211.

It is laid down generally in Req. *vs.* Delme, 10 Mod., 200, "that the queen may amend her pleadings at any time, *nor will any estoppel bind the crown.*" This, however, is not the languge of the court, but of the reporter; and the case itself was on a question of pleading and "adjournatur." The authorities referred to in support of the position, "nor will any estoppel bind the crown," are, 1 Lid., 412, and "that is a short note deciding that the king may bring an action where he pleases; and Hobart, 339; and there the ruling is warranty, collateral binds not the king without true and actual assets, nor by estoppel of his own recitals excerta scientia." This is in accordance with the distinction contended for, and it is believed that no case can be found contrary to that distinction.

The principle of the law of estoppel is the same now as when the grant was made in 1683, to the duke of York by King Charles.

Suppose that A grants land in Pennsylvania to B, to which he has no title; and afterwards the State grants the same land to A, the estoppel would attach upon the land and bind it in the hands of A and his alienees. It operates to convey a legal title to B, the instant A receives the grant. If A died, leaving a son, and after-

wards the son died without heirs, and the land escheated to the State, would it be contended that the title of B, and those claiming under him, would not be good against the State; and yet the State represents and combines the rights both of the crown and parliament.

The duke of York having aliened in fee to Penn, by deed of feoffment, land in which he had nothing at the time of the grant, and receiving in seven months afterwards the grant of the same premises from the king, the title passed by estoppel from him to Penn; and, according to the cases cited, vested the legal title as firmly in Penn as a second conveyance from the duke, and the title, *as the estoppel run with the land*, was not affected by the duke's subsequent ascent to the throne.

But if I am in error as to the title of estoppel, yet the duke of York clearly held, as a trustee for Penn, and whilst he remained a subject, could have been compelled to convey; why not a royal trustee, asks Lord Hardwicke; and to this no answer can be given? It is true that, in the case of a royal trustee, chancery would have no jurisdiction to decree a conveyance; but this alters not the right, but merely affects the remedy. The remedy would be by petition of right.

Though doubts were once entertained whether the king could be a trustee, and there are some old cases to that effect, yet they are not sustainable on equitable principles; and the strength of authority is the other way.

Though Lord Hardwicke did not decide this in Penn *vs.* Baltimore, as it was not within his jurisdiction; yet the principles enunciated show what his decree would have been in a proper case. In the great case of Burgess *vs.* Wheate & Wm. Beach, 143, 144, and 168; Lord Mansfield and the master of the rolls held that the king could be a trustee; and, in our day, it is believed the question would not be arguable. The arms of the prerogative have been somewhat shortened. Suppose land to be conveyed to the king's brother in trust for the use of A, could it be contended that, if he subsequently ascended the throne, he would hold the land discharged from the trust? If A mortgaged land to B, who subsequently ascends the throne, would that bar the equity of redemption? And yet there is no distinction between the two last cases and the principal case, except that they are direct trusts, and the trust for Penn, in the duke of York, arose out of the principles of equity. That the duke of York, whilst a subject, was a trustee for Penn, and could, under the covenant for further assurance, have been compelled to convey, is beyond question. Lord Hardwicke decides *that*, and it is difficult to conceive on what principle *of equity* the trust would be determined by the duke's ascent to the throne.

But if there were any doubts existing as to the validity of Penn's title to the three lower counties, that title was confirmed long prior to the revolution of 1776 by the crown; and, from the questions which arose in reference to the title, it is very evident it was considered unassailable by the crown.

Penn having gone into possession of the three lower counties, under the deeds from the duke of York, remained in possession from 1682 until the revolution of 1776, and the crown never interfered with him except on one occasion, which shall be noticed.

He granted lands, and exercised the powers of government within those counties, during that period; yet Penn was an object of jealousy and distrust during the reign of William and Mary, and if the opinion had not been clear as to his title, would it not have been tested?

As the colonies grew more powerful, it became the policy of the crown to substitute royal for proprietory governments, and though they *negociated* with Penn for the purchase of his right of government, it was never seriously questioned.

The opinion of Northey and Thompson, attorney and solicitor general, given on Penn's title to the three lower counties, has been cited and read against us; but a full investigation of it, shows that it is decidedly favorable.—Chalmers's Opinion, 42, et seq.

An application was made by the earl of Sutherland, an influential noble, to whom the king was largely indebted, for a grant of the three lower counties, alleging that William Penn had no valid title to them.

This was in 1717. Before deciding upon that application, it was referred to the attorney and solicitor general, and the parties appeared before them by counsel, and examined witnesses. At that time William Penn was a lunatic, as stated in the opinion, and those who represented his interests were unable to produce the patent of King Charles II. to the duke of York, of March, 1683. They alleged its existence; but the reasoning of the opinion evidently shows that the attorney and solicitor general considered that, though the patent had partially progressed, it had never passed the great seal. Had William Penn been sane, this could easily have been explained, for the patent which misled those officers was one which was applied for by the duke of York, and though ordered by the king, the issuing of it was delayed by the opposition of Lord Baltimore, until the duke of York ascended the throne. The object of the second patent was, as appears from the note of its contents in the paper-book or breviate, in the case of Penn *vs.* Baltimore, to define and enlarge the description of the lands extending from a point twelve miles south of Newcastle to the Whorekills; and this was more necessary from the fact that the grant of that part of the three lower countries, both in the king's patent and in the duke's deed to William Penn, does not define the *western* boundary at all.

The description of the premises around Newcastle, contained in the duke's first deed to William Penn, was the same in both patents, in that which is now produced, and that which was defeated by Lord Baltimore's opposition. The opinion, however, of the attorney and solicitor generals, notwithstanding the non-production of the patent of 1683, and their belief in its non-existence, was not against the title of Penn, and impliedly by its reasoning admits, that had the patent been before them, they should have considered

the title of Penn as valid. They recommend, without expressing any opinion for or against the title of Penn, that the crown should establish its title in chancery, before making any grant of the three lower counties to the earl of Sutherland. No such proceeding ever took place, and the fair inference is that the crown was advised that the title of Penn was not to be questioned; at all events, Penn remained in peaceable possession, undisturbed by the crown. This, too, was the opinion of crown officers, and it may be assumed as certain that their opinion would not be *against* the crown if a *question* could be made.

But there is another opinion of Northey, attorney general, in the same book, Chalmers's Opinions, 32, 33, expressly in favor of Penn's title to the three lower counties. The opinion was given in consequence of a contemplated agreement between the crown and William Penn, as to the purchase from Penn of his right of government of the province of Pennsylvania and the three lower counties. Its date is 1711, and it is stated that William Penn waited upon him with his title papers, both of the province and three lower counties, and the opinion is decisively expressed as to the validity of Penn's title to both. These are the opinions of able lawyers of that day, and they are in favor of the title of William Penn.

I pass now to an act of the crown, which is irreconcilable with any supposed defect in Penn's title to the three lower counties.

In 1682, after the duke of York's deeds to William Penn, the three lower counties were attached to Pennsylvania, and remained united to her till 1701. In October, 1692, Penn, being out of favor, from his former intimacy with, and supposed attachment to, the duke of York, was removed from the government of Pennsylvania, and of the territories around Newcastle, by William and Mary, and a commission issued to Benjamin Fletcher, then the royal governor of New York, as governor of both the province and territories. Fletcher remained governor until August, 1794, when Penn was restored, by letters patent, to the government of both the province and *territories*.

If the title of Penn to Delaware had not been good, can it be supposed that the crown, having sufficient cause to remove him from the government of both the province and territories, would have restored him to the government of the *territories*?

He held, governed, and claimed them, as granted to him by the duke of York—he, out of favor, and an object of distrust at court; and can the restoration to the possession and government of the territories be viewed in any other light than as a confirmation and recognition by the crown, by letters patent, of the validity of the grant under which he claimed.

But the evidence of the validity of Penn's title to Delaware does not stop here. The proceedings and decision in the case of Penn *vs.* Baltimore, decided by Lord Hardwicke in 1752, are inconsistent with any defect in Penn's title to the three lower counties. Disputes as to territorial rights had existed between Penn and Lord Baltimore from the time of the duke's grant to Penn in 1682. Lord Bal-

timore claimed to the Delaware river, and nearly the whole, if not the whole, of Delaware. The case was decided by the king in council, in 1685, adverse to the claim of Lord Baltimore. A line was established by that decree, and the claim of Lord Baltimore east of that line disallowed, principally on the ground that the grant to him was of unsettled and uncultivated land, not previously colonized by any christian people; and that, as the Dutch and Swedes had both settled and formed colonies on the Delaware, from Cape Henlopen up beyond the northern boundary of the three lower counties, he could not, under a grant by the crown of lands "*hactenus inculta*," claim any portion of those settlements, though otherwise within the geographical boundaries of his patent. It may be objected that this order in council decreed the lands west of this line to be in the king; but the answer to that is, that the proceeding before the council was carried on by Penn in the king's name, and that the question of title, as between King James II. and Penn, either by estoppel, or by trust, was not before the council, and not intended to be affected by the decree. The whole proceedings in the case show this conclusively, and that Penn was the actor on one side, and Lord Baltimore on the other. Penn remained in possession from that time till his death, in 1718; but the line, according to this decree, never having actually been surveyed, and Lord Baltimore not satisfied with the decision, there were constant disputes and conflicts as to its location, among the colonists, and the southern line of Pennsylvania remained also unsettled. In 1732 the representatives of William Penn and Lord Baltimore executed articles of agreement with the view to the establishment of the line between the three lower counties and Maryland, and between the province of Pennsylvania and Maryland. Commissioners were appointed on both sides, and they met repeatedly; but it was only to dispute, and finally, in 1737, a bill in chancery was filed before the lord chancellor by the Penns against Lord Baltimore, for the specific performance of the agreement, and after great delay, and every possible objection interposed, the decree of Lord Hardwicke was pronounced in favor of the Penns, in 1750. It is true that the decree in this case was made with a *salvo jure* of the crown, but though Lord Hardwicke did not, in that case, decide as to any claim or interest in the crown, yet it is certain that the attorney general, though the case stood over to make him a party, made no claim, and interposed no objection on behalf of the crown.

The Penns had then been proprietaries of Delaware, and governed it for nearly seventy years, and it would be absurd to suppose that, if the crown had any valid claim, it would have slept longer upon its rights, when formally made a party to the suit; and, though the decree of Lord Hardwicke did not bind the crown, his doctrines certainly did. Liberty also was given by the decree to either party, to apply to the court for further directions, if by *any act or right* of the crown execution of the decree was obstructed. No such obstruction occurred, and no application was made by either party under the liberty reserved.

After great delay, a second agreement in 1760, and further dis-

putes, and a second bill in chancery, and decree, the line of division was finally adjusted, and the boundaries fixed and established under the decree by actual survey, and marked out with stones, pillars, and other land-marks. In 1767, whilst the survey was in progress for establishing the division line between the colonies, a joint petition was presented to the king, by Lord Baltimore, as proprietor of Maryland, and the Penns as *proprietaries* of the counties of Newcastle, Kent, and Sussex, and the province of Pennsylvania. This petition, after reciting, (among other things,) that the commissioners to mark and bound the division line were proceeding in their work, and that the said proprietors were desirous to quiet the minds of all his Majesty's subjects inhabiting the disputed parts of said provinces and *counties*, and that a final end had been put to all their contests and litigations, by an agreement made in 1760, prays that his Majesty would be most graciously pleased to give his royal allowance, ratification, and confirmation of the several and respective articles, and enrolled decrees, and every article, clause, and thing in them contained. Upon this petition an order in council was made on the 11th of January, 1769, signifying the royal approbation of the agreements and proceedings mentioned in the petition of the said proprietaries, whereof as well the proprietaries as all others whom it might concern, were ordered to take notice, and govern themselves accordingly.

It is submitted that this is, was a full and complete recognition and confirmation of the title of the Penns, under the deeds of feoffment, from the duke of York, by the crown, and that if any *question* had previously existed, as to any claim in the crown, it was abandoned. The deeds of feoffment are recited in the articles of agreement, as the origin of the Penn title, and that agreement, and the decree for its specific performance, were both ratified by the king in council.

Could a patent from the crown have greater effect in confirming the title of the Penns to the colony of Delaware? They had then been in possession as proprietaries nearly ninety years, granting lands, and reserving rents as such, and exercising, without hindrance from the crown, the powers of government conferred by the charter of 1683; and the three lower counties had existed as a separate colony, with its own legislature, under the proprietary government of the Penns, since 1701. It would be a vain attempt to sustain any title against the crown, if, in 1769, the Penns had not a valid title to the colony of Delaware, according to its boundaries, designated in the deeds from the duke of York to William Penn.

If, then, I have established the validity of the grant, it is valid for all intended to pass by it. The next question is, did not the description, in the first deed of feoffment, and in the king's patent, include the Delaware river within the twelve miles circle? It is conceded that the bay is not included in the second deed of feoffment, and that the tract, extending from a point twelve miles south of Newcastle to Cape Henlopen, is bounded by the bay, and does not extend beyond low water mark. Delaware has never claimed

the jurisdiction over, or title to, the river or bay below the southern boundary of the circle, except ad filum aquæ. But the eastern boundary of the grant, in the first deed of the duke of York, it is contended is the low water mark on the Jersey shore.

The grant of New Jersey, as I have already shewn, was limited by the low water mark of the river and bay, and the right to the river in 1682 remained in the crown.

Does not a just interpretation of the description in the first deed, from the duke of York to Penn, and in the patent to the duke, include the river and its soil within the twelve mile circle? The first part of the description is, "all that the town of Newcastle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying, and being upon the river Delaware, in America." If the description of the thing granted had stopped here, it clearly would not have included the river, for it is of a tract situate and lying upon the river Delaware, and, as nothing passes in a royal grant by implication, the river would not have passed. It also conveys land, not on both sides, but only on one side of the river—the western—within the compass or circle of twelve miles about the town, and this is rendered more evident by the added words in the patent, "lying between New Jersey and Maryland." But there is no rule of construction which can exclude the following words of description from their just operation: "And all islands in the said river Delaware, and the said river and soil thereof lying north of the southernmost part of the said circle of twelve miles about the town." You cannot strike these words from the deed, and they can have but one of two meanings. The previous part of the description covered all the land within a circle of twelve miles about the town, lying on the river, and the river became the boundary; and the subsequent words must either intend to convey all the river north of the southernmost part of the circle to its source, or to the head of navigation, or else all that part of the river north of the southernmost part of the circle within the limits of the grant; that is, between the two points where the circle cuts the river north and south of the town of Newcastle. That the last is the true construction, I cannot doubt; for, though in a royal grant nothing passes by implication, the description of the thing granted may be *restrained* by reasonable implication, and it would be a reasonable implication to say that the river was intended to be granted so far as it bounded the land granted in the previous part of the description, and no further. If the river, so far as it bounded the land within the circle, was not intended to pass by the latter clause of description, it is difficult, if not impossible, to conceive what other language could have been used for that purpose. One can almost fancy that the writer of the deed had Lord Hale's treatise before him; for he has used just such language as Lord Hale says is apt and proper for a grant of a river and the subaqueous soil. Indeed the description is so clear that it is useless to comment further on the construction, and more especially as I shall have

occasion again to revert to it in reviewing the opinion delivered by Judge Baldwin in the case of the lessee of Gale *vs.* Belin.

If, then, the title to the river Delaware remained in the crown of England after the grant which includes New Jersey had been made, and the crown, by its subsequent grant to the duke of York whose title vested in Penn, granted not only the land within the twelve miles circle, but the river, its soil, and the islands therein, and the claim of both New Jersey and Delaware is founded *on grant*, it must depend for its determination on the just construction of the terms of the grant; and the river within the twelve miles circle is, therefore, within the boundaries of Delaware.

But a question may be raised, if question it can be called, as to the right of the king to grant a river and the subaqueous soil to a subject, so as to pass the islands subsequently arising in the river.

It is presumed there can be no doubt as to the determination of this.

Maritama incrementa belong, of common right to the king, but may become the property of a subject by grant or prescription. Hale de jure 14, 17, 18.

They are of three kinds:

1st. Per projectionem vel alluvionem.

2d. Per relictionem vel desertionem.

3d. Per Insulæ productionem.

Hale de jure, 14.

The last alone are in question here, and the rule as to them is clearly stated by Lord Hale, in his treaties. "As touching islands, arising in the sea, or in the arms or creeks, or havens thereof, the same rule holds which is before observed, touching acquests by the reliction or recess of the sea, or such arms or creeks hereof. Of common right, and prima facie, it is true, they belong to the crown, but where the interest of such 'districtus maris,' or arm of the sea, or creek or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject according to the limits and extents of such propriety."—Hale de jure, 36, 37.

This passage is quoted and recognized by Holroyd J. in Blundall *vs.* Caterall, 5 B. and A. 268, as showing the difference between the common and civil law, in respect to the propriety of islands newly rising in the sea, or one of its arms. There can, therefore, be no doubt as to the right of the king to grant the subaqueous soil of the sea, or one of its arms, and that in such case the propriety of an island, arising within the boundaries of the grant, will be in the subject to whom the grant was made.

It is true that in such grants the jus privatum of the grantee is always subject to the jus publicum. The right of navigation and passage and repassage, unobstructed by nuisances and unimpeded by exactions, has always been admitted as a jus publicum, belonging to the people, and from which no grant by the crown could derogate. It is called a servitude belonging to the people.—Hale de jure, 6.

Whether the common right of fishing in navigable streams is in the people at large, as part of the jus publicum, so as to prevent a grant by the crown excluding it, since magna charta, is a question yet open for discussion, but it has no bearing on this case. That the crown might grant a navigable river and the soil thereof, subject to the jus publicum, has never been doubted, and the propriety of islands, arising in the river, cannot be a part of the jus publicum, because that refers solely to common rights, and islands must, from their nature, be the subject of exclusive appropriation.

This is in accordance with the language of Hasner J., speaking in reference to the rule of the common law: "it promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to every thing capable of ownership a legal and determinate owner."—Adams *vs.* Pease, 2 Conn. R., 483.

The common right of navigation is now in all the people of the United States, and no State can control it; but the common right of fishery is in the people of each State, and to the extent of her jurisdiction and within her territorial limits, the State may control or grant it.

In this case, however, it is unnecessary to determine whether the right of fishing in the river Delaware, within the twelve mile circle, is exclusively within the jurisdiction of Delaware.

Admitting, however, a common right of fishery in the people of the colony of New Jersey in 1682–1683, and subsequently, this would not grant the river or its soil, whether the right arose from grant or prescription.

A prescription, extending to a liberty, profit apprende, or jurisdiction, such as liberty of free fishery, &c., is not an acquest of the soil or water, but leaves them where it found them.—Hale de jure, 32.

The deed of confirmation of the duke of York to the trustees of the proprietors of New Jersey, was not intended to extend the territorial limits of the colony.—Corfield *vs.* Coryell, supra.

It merely operated to secure the common rights of navigation and fishery.

Lord Hale's treatise de jure maris has been most usually cited, and relied on in support of these principles, and that because of the authority it has justly attained, and the clearness and fulness of its doctrines. He needs no eulogy from me. His mind was of that extraordinary cast, which combines an unbiassed judgment with the most accurate discrimination, free, too, from the vice of over refinement, (the besetting sin of discriminating minds,) and enlightened by the most profound study and research. Add to this, a character of stainless purity, and we cannot wonder at the authority attributed justly to his treatise de jure maris, in the note to 6 Com. 536. "It has (says the learned annotator) been so often recognized in this country and in England, that it has become the text-book from which, when properly understood, there seems to be no appeal, either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water." If, indeed, the too vivid language of Mr. Wirt

should be used in reference to any mortal, Hale, if any man, would justify its application, "that with a mind beaming the effulgence of noon-day, he sat upon the bench like a descended God."

There is, however, a decision in the highest tribunal of our own country, the Supreme Court of the United States, which seems to foreclose all further questions as to this branch of the inquiry. I allude to the case of Martin et al *vs.* Waddell, 16 Peters, 406.

As a direct decision, it does not determine the issues in this case, but its principles have a strong bearing in favor of the title of the United States.

The question in this case arose as to the title to the subaqueous soil of the Raritan bay, which is exclusively within the limits of New Jersey. Whether it was in the grantees of the proprietors of East Jersey, or in the State of New Jersey, or its grantees?

The court held, that the bays, rivers, and subaqueous soil, *within the limits of the charter*, passed by the grant of the king to the duke of York, as part of the jura regalia, and not as private property, and that by the surrender of the powers of government by the proprietaries of New Jersey, in 1702, they were restored to the crown as part of the jura regalia.

They also held that, when the people of New Jersey took possession of the reins of government, and took into their hands the powers of sovereignty, the prerogatives and regalities which, before, either belonged to the crown or to parliament, became immediately, and rightfully, vested in the State.

The language of the grant was partly relied on, to show that the Raritan bay passed as part of the jura regalia, and not as private property to the duke of York and his grantees.

The bay was held to pass by the charter, though not especially described, merely because within the limits of the grant, and, a fortiori, the river Delaware passed to Penn when specially described.

No principle sustained by that decision can have any but a favorable effect on the title of the United States in this case. Whether the river and its soil passed to Penn as part of the jura regalia, or as private property, all within the limits of his grant, by the revolution of 1776, passed to the people of Delaware, and not to the people of New Jersey. Penn never surrendered the rights of government to the crown, but the colony remained under the proprietary government until its political condition was changed by the revolution. Take the opinion of the court in the case cited, and there can be no doubt that all within the limits of the charter passed to the proprietary either as private property, or as part of the jura regalia. The right of the proprietary in the colony, as in England, was subject to the jus publicum of navigation, and, if you please, of common of piscary. The duke, his heirs and assigns, were to stand in place of the king, and administer the government according to the principles of the British constitution, page 412. Such, too, was the situation of Penn, as assignee of the duke. If, then, the island had arisen before the revolution of 1776, it must have belonged to Penn, as standing in the place of the king, if the river

and soil passed as part of the regalia; and if the river and soil passed as private property, the island would equally belong to Penn; and whether the river and soil passed as private property, or as one of the royalties, they were equally within the limits of the charter. The moment the island arose it became the property of the owner of the river and subaqueous soil; and I submit that any island arising, so as to become capable of occupation, in the river Delaware, within the limits of the twelve mile circle, would have belonged to William Penn, or his assigns, as proprietaries of Delaware, at any time between the charter of 1683 and the revolution of 1776. If, then, before the revolution, as between the proprietaries of New Jersey and the proprietaries of Delaware, or the crown and the proprietaries of Delaware, the river and its soil belonged to the latter, can there be a doubt that, by the effect of the revolution, *all* within the chartered limits of the colony passed to the State of Delaware?

The revolution affected the political condition, but did not change the territorial limits of a single State. So far as the river Delaware, before the revolution, was within the territorial limits of the colony of Delaware, it became by the revolution a part of the State of Delaware.

It is presumed this will not be denied; as in no other mode have the territorial limits of any of the thirteen original States been ascertained.

All the lands we hold were originally derived from the crown, and the power to dismember a proprietary government was not claimed by the crown. Johnson *vs.* McIntosh, 8 Wheat., 532.

Virginia opened her land office for the sale of land in Kentucky, though every acre was in possession of the Indians. 8 Wheaton, 535.

And why? Because within her chartered limits as a colony.

Can it be questioned, therefore, that all within the colonial boundaries of Delaware, as they existed in 1776, remained within the boundaries of the State of Delaware after the revolution.

This case clearly depends upon whether we have established the grant of Delaware to Penn as a valid grant, either in law or equity. If the colony of Delaware was held, possessed, and enjoyed under a grant, then the boundary must depend upon the just construction of the grant. New Jersey had no title, under her grants, to the river. The general terms of bays, rivers, &c., must be confined to rivers, &c., within the boundaries of the granted premises. Corfield *vs.* Coryell, 4 Wash., C. C. R., 384.

It would be absurd, and contrary to all authority, to say that a grant included the navigable stream bounding it, unless passed by special words. The grant of Delaware includes all that portion of the river within the twelve mile circle, by express words.

If the right of Delaware were founded on no better title than appropriation, then it is admitted that she would hold only ad filum aquæ. That is the extent of her claim as regards the waters of the bay and river below the twelve mile circle. So, too, as between Pennsylvania and New Jersey; neither colour included the river

within its chartered limits, and, therefore, each took by appropriation ad filum aquæ, as against the crown, by the effect of the revolution. And such is the rule laid down by the supreme court in Hanly's lessee *vs.* Anthony, supra.

The title of Delaware, however, is held under grant, and not by prescription.

It so happened that a dispute occurred as to her western boundary during her colonial existence; and it was determined according to the lines of the charter, and not on the ground of appropriation.

A considerable tract of land on her western border was taken from Maryland, who had appropriated it, and added to Delaware, in settling the boundary according to the grant. This was determined whilst Delaware was a colony; and had a question then arisen as to her eastern boundary, must not the same rule have governed?

Any question which existed between the crown and the proprietary, which I have already discussed, was as to the *whole* territory.

If the title of the proprietary was good as to part, that is, if the grant was valid, there existed no doubt as to the eastern boundary. A question has been now made as to her eastern boundary, and why should it be determined on a different principle from that which governed the settlement of her western boundary? That is, the limits included within the deed of feoffment and the patent confirming it.

The possession of Maryland did not protect for her, in 1750, the land in her possession for many years, but within the *chartered limits of Delaware.*

How, then, can the title of New Jersey be pressed beyond her chartered limits, within the limits of Delaware, unsupported by any possession whatever? Navigable streams within the limits of a State are as much a part of the State as land, and the Delaware river as clearly within the limits of Delaware, within the twelve mile circle, as Raritan bay is within the limits of New Jersey.

Against this chartered title of Delaware, in 1776, has New Jersey, either before or since that period, acquired any title by prescription or adverse possession?

The memory of man will not reach to acts previous to the revolution; but the possession would be presumed to follow the title, both as to the water and the land, within the grant, and co-extensive with it, unless a contrary adverse possession and exercise of right could be shown.

Legal seisin and possession, which follows title, is co-extensive with the right, and continues until it is ousted by an actual adverse possession, as contradistinguished from residence and occupation. Mitchell, et. al. *vs.* U. S., 9 Peters, 735; U. S. *vs.* Arredando, et. al., 6 Peters, 743.

There is no evidence of adverse possession, and it cannot be presumed.

There are but two islands in the Delaware river, within the twelve mile circle; Reedy island and the Pea Peatch,

and of neither of these has New Jersey ever had possession. Goose island does not deserve the name of an island. It is a small sand or mud flat, near the Pea Patch, vacant and unoccupied, and worth nothing. In Delaware we never fight about straws, and abhor abstractions. Whether my colleague considers the Wilmot proviso as coming within that designation, I am unable to answer. Reedy island New Jersey never possessed or claimed, and the Pea Patch she has claimed, but never possessed. These alone are the things capable of adverse possession.

Then, as to prescription; if there is any evidence as to that, it is only as to common rights; and, as has been already shown, prescription for a liberty, profit, apprendre or fishery, does not acquire the soil. Hale de jure, 32, 33.

But, in fact, New Jersey has no evidence showing any claim, by prescription, to the fisheries, much less to the river and soil of the Delaware, within the twelve mile circle.

The acts relating to fisheries in 1765, 1770, (Allenson, N. J. Laws, 279, 367,) were conditional, and made dependant upon the passage of similar laws by the province of Pennsylvania, before they were to take effect. They could relate only to that part of the river between Pennsylvania and New Jersey, as Delaware was then a distinct colony; and they imply, if anything, that New Jersey had no claim to any right of fishery in the river, below the line of Pennsylvania, or otherwise the laws would have been made conditional on the passage of similar laws by Delaware, as well as Pennsylvania.

In 1719, New Jersey bounded her counties by the river, (N. J. Laws, 1, Bradford's edition,) and she never attempted to extend those boundaries till 1822, *post litem motam.*

This boundary shows her own construction of her charter.

The act of 1676, regulating fisheries in the Delaware, (Leaming and Spicer, 390,) is the only act asserting the right to fisheries in the river generally. This might well be, as it was a *common right* in all the king's subjects, while the river was ungranted and in the crown; and the river within the twelve mile circle was not granted till 1683, seven years afterwards.

The act of 1681, regulating the fronts on the river, was no claim to the river; for all the people of New Jersey had the common right of navigation, and the boundary of the colony was at low water mark on the river. The act of 1783, respecting the islands and jurisdiction over the river, was passed in pursuance of a compact with Pennsylvania, and stops at the Delaware line. It can have no effect as to the rights of Delaware, which was then an independent State, though it might be a proper arrangement between New Jersey and Pennsylvania.

As to the surveys of islands outside the circle, if proved, they do not touch the question; neither does possession of those islands, if shown, which it is not, for on no principle can the possession of an island, not within the boundaries of Delaware, affect the title of Delaware to all islands within her limits.

I come now to the alleged survey of the Pea Patch, in 1784.

In 1743, the council of proprietors of New Jersey issued a *general* warrant in favor of Samuel Atkinson and wife, for six hundred acres of land, anywhere in west Jersey, below Trenton Falls. In 1782, the same council issued another general warrant, in favor of Daniel Ellis, for five thousand acres of land, anywhere in west Jersey. By mesne assignment, one Edward Hall became the owner of 52½ acres of the first warrant, and one hundred and twenty-six acres of the second warrant. Under these warrants, Edward and Clement Hall caused an alleged survey to be made, on October 8, 1784, of the Pea Patch island; and a return of a survey was made, under this warrant, by Elnathan Davis, a deputy surveyor, of an island called the Pea Patch, containing 178 acres. The return was dated October 27, 1784, and approved by the council of proprietors, November 3, 1784. The answer to this is: That the warrants authorised a survey of land in *west Jersey*. But the river Delaware was never within the limits of New Jersey, or belonged to the proprietors. The location of the warrant was the unauthorised act of an individual, because not within the propriety of the council of proprietors, and therefore merely void; and the council of proprietors had no authority to ratify such survey. According to the decision in 16 Peters, Martin, et. al. *vs.* Waddell, even had the river been within the boundaries of New Jersey, after the surrender of the regalia, in 1719, their act of ratification would have been void as against New Jersey. The subaqueous soil within the limits of the colony, belonging to the crown, as part of the jura regalia surrendered, and the island arising after the surrender, would belong to the owner of the propriety of the soil; that is, the crown, before 1776, and the State of New Jersey, if within her limits after that period.

But no semblance of proof of any possession of the island is adduced, until Doctor Gale fished there in 1813; and, indeed, in 1784, it was incapable of possession; for, in 1780, says Judge Johns, and he is uncontradicted, and the oldest witness in the cause, "it appeared not bigger than a man's hat." And this accords with the old map produced by the other side, made by a British naval officer, in 1777, on which the Pea Patch is represented as a shoal, and not as an island. But, in point of fact, there was no actual survey. The description shows this, and the attempt to adjust the size of the island to the interest of the Halls, in the warrants of 178 acres, when "it was not bigger than a man's hat."

The survey was made, as alleged, in 1784, and the return is of one hundred and seventy-eight acres, and the island, which has been constantly increasing, is now, in 1847, found by actual measurement, by the United States officers, to contain less than ninety acres of land.

But can it be seriously urged that a mere nominal survey, made without any authority, under a general warrant from the proprietors of west Jersey, who never had any title to the river, and no possession taken under it, till the State of Delaware ceded the island to the United States, can sustain a prescriptive or possessory title in New Jersey, adverse to the legal seisin of Delaware? If

this be contended for, the only proper answer is "*stultum est absurdas opiniones accuratius refaellere.*"

No attempt has been made to prove that New Jersey ever exercised any jurisdiction, *in fact*, over the river Delaware, within the twelve mile circle; and where, then, is the evidence of prescriptive title ousting the legal title of Delaware?

Has Delaware either abandoned or failed to exercise her rights since the revolution? We have proved by the testimony of her lawyers and judges, one of them Judge Johns, residing as a lawyer at Newcastle as early as 1780, that on all occasions she has claimed and exercised jurisdiction over the river within the circle. This is not only competent, but, from the character, pursuits and intelligence of the witnesses, the *best* testimony; and, being in accordance with the rights of the State, under her charter, slight evidence would be sufficient, if any was necessary.

But we have also proved particular instances as early as 1800 and 1805, in one of which the sheriff of Newcastle county, with a posse, arrested a man on board a vessel, grounded on the Jersey shore; and in the other, the witness arrested a person just as the vessel touched the wharf, on the Jersey shore, and brought him back to Newcastle, where he satisfied the claim; and in neither case was any one ever questioned as to the rightfulness of the arrests.

We have also shown, by numerous witnesses, that such an exercise of jurisdiction has been of common and constant occurrence, though the particular names of the parties may not be recollected. We have also produced the copies of records from the State court, and from the district court of the United States for the Delaware district, showing the repeated exercise of jurisdiction over the river within the twelve mile circle without regard to the filum aquæ; and, in no case, has the jurisdiction been questioned.

And how has this mass of evidence been encountered on the other side? No judge or lawyer from New Jersey has been produced, to prove that, before this controversy arose, that State ever *claimed*, much less exercised, any jurisdiction over the river within the circle; yet there are lawyers and judges in New Jersey old enough to prove such claim if it ever was made. No single case of the exercise of admiralty jurisdiction within those limits has been or, it is believed, can be adduced. But it is not merely the absence of proof as to this which can be relied on. Governor Bloomfield, of New Jersey, was ex officio the chancellor of the State, and it is a rational inference to suppose that he was acquainted with the limits and jurisdiction of the State in which he filled so high a judicial station; yet, in 1813, Governor Bloomfield, then an officer of the United States, being authorized to procure the title to the island for the erection of a fort, applied to the State of Delaware and obtained from her the cession to the United States.

It is impossible to suppose, that if he had ever heard of *even a claim* on the part of New Jersey, he would not have applied to the legislature of his own State, if not to make, at least to corroborate the grant.

Richard Stockton, of New Jersey, the ablest lawyer the State

has produced, and the equal of any, in the United States, was, when this claim was pursued in 1819, retained as one of the counsel of the United States to defend their title, under the State of Delaware.

The opinion he expressed in writing has been lost; but its contents (were that necessary) could be proved to be clearly adverse to the title of New Jersey. But there is sufficient proof of that in the character of Mr. Stockton. Moving in the highest walks of his profession, there were with him, as among those who most adorn the profession of the law there always must be, other considerations besides that of mere emolument to be weighed, before embarking in a cause. He was strongly attached to his State, and had he believed the title to any part of her territory, or any right of jurisdiction justly belonging to her to be in question, it may be assumed as certain, that he never would have arrayed his talents against the interests of a State of which he was so distinguished a citizen.

It is but a just inference to say, that he knew the claim of Dr. Gale to be groundless, and that New Jersey had no title to the river within the twelve mile circle. The whole weight of the testimony, therefore, supports the legal title of Delaware, and utterly prostrates any prescriptive or possessory title in New Jersey.

There is but one other question to be discussed in reference to the title, and that arises out of the opinion of Judge Baldwin, in the case of the lessee of Gale *vs.* Belin, on the trial of that case, in New Jersey, in 1836. In meeting this question I shall also review, generally, the opinion delivered by Judge Baldwin in that case.

No one more willingly admits, or more highly respects than I do, the acknowledged ability and learning of Judge Baldwin; and it is difficult to account for the confused character of parts of that opinion, and its conflict with known principles of law, except on the supposition that the intellect was in a state of irregular action at the time of its delivery. It contains many sound principles of law; but is in parts incongruous and confused, and has more throughout the aspect of a forensic argument in support of the title of New Jersey, than a judicial opinion. In justice to the learned judge, however, it must be admitted that the case before him was, in many respects, vitally different as to the evidence from that now before your honor.

There was no documentary evidence on behalf of the United States, except the two deeds of feoffment from the duke of York to William Penn; not a single witness was examined on their behalf, in support of the title of Delaware, whilst the loosest depositions, containing much of hearsay and assertion, were admitted in support of that of New Jersey. The patent from King Charles II. to the duke of York was not before him, and its non-existence was asserted arguendo, and admitted by the judge in his charge to the jury. With all this allowance, however, the opinion is in many parts utterly unsustainable.

The commencement of the charge, as to the dispossession by mil-

itary force, was calculated to prejudice the defence, and the fact being irrelevant to the merits, the allusion might have been excusable in counsel, but not appropriate when falling from the bench. The first position taken by the learned judge for granted, may be well questioned as doubtful. "The possession taken by the United States presents no objection to the trial of the right of possession." Is not this doubtful? The cause was in the circuit court of the United States, and the defendant a civil officer of the United States, and as such living on the island.

He was not a tenant, and the possession was admitted to be in the United States. Under what law was there any jurisdiction to sue the United States in their own courts? Suppose the defendant had pleaded the facts to the jurisdiction, is it certain that the court had any authority to proceed with the suit; and if the same facts appeared on the plea of not guilty, would that alter the resu[l]t?

There are many parts of the charge to which it is unnecessary to advert, and I shall notice only those which I consider material. The judge proceeds to place the question of title on its proper basis, the relative titles of Delaware and New Jersey. Then follows an exposition of the law of nations, as to States having a river as a common boundary. This law is correctly laid down, and the only objection is, that it was inapplicable to the facts of the case and calculated to confuse the jury.

After somewhat more of unnecessary and irrelevant learning, the leaned judge says: "The three lower counties were held under two deeds from the duke of York to William Penn, in 1682, without any direct grant from the crown. *They were united to Pennsylvania in that year, and so continued till the revolution.*" Here we have two mistakes. One, perhaps, unavoidable; because the title of Delaware was not properly presented to the court, and yet among the laws of the Judge's own State, the charter of King Charles II. to the duke of York is recited in an act passed in 1715 to settle the circular boundary between Pennsylvania and Delaware, and is to be found at length printed in the third volume of the Votes of Assembly of Pennsylvania, as early as 1753. The second mistake is less excusable, as the slightest acquaintance with the history of his own State, or a reference to the printed laws of Delaware, which he afterwards used against the title of that State, would have informed him that the union between Pennsylvania and Delaware was absolved in 1701, and never afterwards renewed; and yet that fact was material as answer to much of the testimony as to prescription in the cause.

The learned judge then returns to the law of nations as applicable to States not existing by grant, and decides against the title of Delaware beyond the *filum aquæ*. The only objection to this is its immateriality to the case before him.

He then proceeds to consider the title of New Jersey by *grant*, and admits that her territory extends only to low water mark on the river Delaware; that the river is not within the limits of the grant. Then follows the examination of the title of Delaware, and an abstract of the deeds of the duke of York to Penn is given, and

two questions are stated as arising on these deeds. First, whether they passed any title; and, second, their construction as to boundaries. After stating what he declares to be fatal objections to the deeds on the question of title, he then assumes their validity in order to proceed with their construction. Much argument is then adduced to show that the deeds must not be so construed as to include any part of New Jersey. As this has never been contended for, and is not called for by the natural and obvious construction of the grant, comment is useless. Indeed, this part of the argument only tends to confuse the case, and that is a sufficient objection.

The opinion then proceeds as follows:

"There are three points in the first deed: One in Newcastle; one on the Delaware, twelve miles north; the other on the Delaware, twelve miles south; but it does not purport to extend across the river, or to embrace any part of New Jersey within the circle, or, if it did, the grant would be so far void for the reason before given. It is of a tract of land lying on the river, the bounds of which must be on the bank, and not in the river, following the process of the circle. That this is the meaning of this deed, is evident from the boundaries of the second deed granting 'that tract of land upon Delaware bay and river, beginning twelve miles south from Newcastle.' We have then no difficulty in ascertaining the land that was granted to be that which lay on the river between the two points, each twelve miles distant from a common centre in Newcastle, and from such centre twelve miles back towards Pennsylvania and Maryland, and no other, nor beyond the low water mark on the river."

The construction of the learned judge is *thus far* questionless correct, but when he states that "the grant does not purport to extend across the river," he admits the immateriality of a previous part of his argument, to which I have made that objection. It is difficult also to perceive how the meaning of the first deed is evident from the boundaries of the second deed; and we shall see hereafter that, adopting this mode of construing one deed by the other, the learned judge arrives at some extraordinary conclusions.

The opinion proceeds:

"Then follows the grant of all islands in the said river Delaware, and the said river and soil thereof lying north of the southernmost part of the said circle of twelve miles about the said town. The habendum is of the said town and circle of twelve miles of land about the same, islands and all other, the premises granted, or intended to be so; and the same clause is in the covenant for further assurance, omitting the grant of the river otherwise than as it may be included as part of the premises granted, or intended to be granted. A reference to the second deed will tend to ascertain the meaning of the first. There is no grant of any part of the river or any island below the beginning point of the second tract. A grant of the use of the harbors, waters, &c., belonging to the river and bay, precludes any construction which would make the deed pass the river, bay, or its waters beyond the

low water line. No word or expression is in it which could be made to include anything else; the grant is of the free use and passage into and out of all harbors bays, waters, rivers, isles, and inlets belonging to or leading to the same."

Here we find the learned judge, after quoting the words which expressly convey the river, proceeds to state that the habendum and covenant for further assurance omit the grant of the river; and though he draws no inference thus far from that fact, his view of its effect is afterwards distinctly developed. But he assumes the position that the description of the thing granted in the first deed is to be ascertained by a reference to the second deed, and draws the inference that because the bay and island are not conveyed in the second deed, therefore, contrary to the express language of the first, the river does not pass. Against such a rule of construction I protest as utterly irrational and against any known rule of construction. The deeds were executed on the same day, but for distinct tracts of territory; and there is as strong reason for holding that, inasmuch as the river and islands pass by express words in the first deed, that, therefore, they were intended to pass by the second, and to control the grant in the first by the description in the second deed.

Neither, however, is admissible. The subject matter conveyed is distinct in each deed, and there is no conflict in the description; and it might as well be said that, if a man grants white acre to A, reserving a right of way, and on the same day, by a second deed, grants black acre adjoining it to A, without any such reservation, the reservation in the first deed is to be treated as a nullity. In this case, in the first deed there is a reservation of five shillings rent to the duke, and, in the second, Penn covenants to account for and pay over to him one moiety of the rents, issues, and profits of the land conveyed. How absurd would be the construction that Penn's covenant bound him also to pay over a moiety of the rents, issues, and profits of the lands conveyed in the first deed, though it contains no covenant to that effect; yet it would be just as reasonable as the construction by which the learned judge nullifies the express grant of the river in the first deed.

The opinion then proceeds with the following sentence: "Now it would be a singular construction of the two deeds to hold them to make the east boundary of the entire grant the radius of a circle extending from the north and south points of the first grant across the Delaware in the water to the Jersey shore, and south to Cape Henlopen, only to the low water line."

The meaning of this sentence is utterly inexplicable, and, after studying it with close attention, I have become satisfied that it is beyond comprehension. It is not, however, at all singular that the duke should choose to convey the *river* Delaware within and opposite to the shore line of the first grant, and yet not choose to convey the Delaware *bay* with the land embraced in the second grant, of which it formed the eastern boundary. Both tracts might well have been conveyed in one deed, if such difference as to the grant of the river and non-grant of the bay had not been intended.

The opinion further proceeds:

"We think the deeds are not to be so taken, and that the utmost latitude of construction which can be given to the first is to include only such islands and such parts of the river as lie between a direct line drawn from the north and south points where the circle strikes the Delaware, and on its western bank."

Whence such a rule of construction is derived, we have no information, nor has the learned judge enlightened us as to its propriety or accordance with the language of the deed.

Irrational as the rule is, however, the learned judge does not decide whether it is the true construction of the grant; and yet the decision on this point was essential, because adopting the rule the Pea Patch island is within the limits of Delaware. The only inference that can be made is that the learned judge was unaware of the course of the river, and did not perceive that, under his own rule, a chord of the circle, drawn from the point where its periphery cuts the river at the north to where it cuts it at the south, would not only include the Pea Patch, but also part of the Jersey shore. The exhibition of legal acumen and geographical knowledge, in this part of the opinion, are equally apparent.

The learned judge then proceeds with another mode of construction, as follows:

"Taking the granting part of the deed with the habendum and the covenant for further assurance, it would admit of a still narrower construction. By omitting the river in the two latter clauses, which specially mentioned the main land and the islands, it might be fairly inferred that the grant was intended to cover no more, so as to make it conform to the second grant below the twelve-mile point, the grant of New Jersey to Berkley and Carteret, and of Pennsylvania to William Penn, all of which were limited by the Delaware as the boundary."

This part of the charge is open to two objections: not satisfied with his previous reference to the second deed, in order to pervert the description in the first, the learned judge suffers his view of the construction to be biassed by other grants to other parties, and long antecedent, under a strange notion of conformity. It is needless to say that the law warrants no such rule of construction. But the most unaccountable defect in this part of the charge is that the learned judge seems totally ignorant of the difference between the respective offices of the premises and habendum of a deed. Because the habendum and covenant, for further assurance, omit the words "river and soil thereof," though all other the premises is the language of both the habendum and the covenant, the learned judge says: "it may be fairly inferred it was intended to cover no more." The ruling, therefore, is that the omission of part of the special description in the premise of a deed from the habendum authorises a construction which shall exclude from the grant what is fully described in the premises. If this be law, then Sheppard's Touchstone is not law, and the best commentary on the illegality of the construction is to cite the passages which show what the law is:

"The office of the premises is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted, either by express words or by that which by reference may be reduced to a certainty, and the exception, or thing to be excepted, if there be any."—Sheppard's Touchstone, p. 74, Preston's ed.

Again: "The office of the habendum is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use."—*Ibid*, p. 74.

One more quotation will suffice:

"*And if the thing granted be left out, in all or in part, in the habendum, yet the grant is good, (by force of the premises;) and, therefore, if one grant land to A, habendum (without naming the land) to A, his heirs, &c.; or if one grant white acre and black acre to A, habendum white acre, to A, and omit black acre; yet these deeds are good, and all that is contained in the premises of the deed doth pass in both cases.*"—*Ibid*, *p.* 76.

Can the learned judge's violation of a rule so plain and familiar be otherwise accounted for than in the mode I have suggested? The charge as to the construction of the deed does not stop here, but the climax is attained in what follows:

"Or if that construction would be too strict, we would be clearly of opinion that the grant of the "river and the soil thereof" would not extend beyond its main channel according to the course of the river opposite its western bank between the two twelve mile points north and south of Newcastle, upon the shore of the river. On this or any other view of the deeds of 1682, we think that they did not embrace that part of the river in which the island in question is situated."

The argument is, that the grant of the "river and its soil," means *half* the river, and the only wonder is, that the learned judge did not decide that the circle of *twelve* miles about the town meant *six* miles about the town, and perhaps, had the question been as to the western boundary, he would have arrived at that conclusion. This closes all that part of the charge which relates to the construction of the deeds, and I think it fully sustains the character which I have previously given to that charge. My own construction of the first deed, which alone is in question, has been already given, and its repetition would be useless. The residue of this extraordinary opinion needs but little further comment. It may be remarked, however, that the learned judge entirely misapprehends and mistakes the decision of Lord Hardwicke in the case of Penns *vs.* Lord Baltimore.

No decision was made on the claim of the crown, but the decree was entered with a salvo jure; but the reasoning of Lord Hardwicke shows that his opinion was against the crown on the ground of a trust, if not of an estoppel. In a subsequent part of the opinion, the learned judge appears to become convinced that, by the acts of approbation and confirmation by the crown, the deeds of the duke of York acquired the same effect as if they had been made under letters patent to him by the same boundaries, thus ren-

dering nugatory much of the preceding part of the charge, and leaving but three objections to the title of Delaware.

1st. His own perverse construction of the deed from the duke to Penn.

2d. The erroneous application of the law of prescription; and,

3d. His extraordinary doctrine as to election of title by the State of Delaware.

The question of construction I have already noticed, and as to a title by prescription in New Jersey, the facts before you afford it no shadow of support. Whether any further evidence on this point was adduced before Judge Baldwin does not appear, but it is certain that by a singular confusion of ideas he relies upon the grant of islands *outside* of the circle by the proprietors of West Jersey, as early as 1739, to sustain a prescriptive right to the Pea Patch, which is within the circle and the limits of the grant to Penn.

On what principle can any act of the proprietors of New Jersey, not in derogation of Penn's title, be used to sustain a prescriptive claim against that title? A grant by those proprietors of an island in the Delaware outside of the circle, was repugnant to the right of the *crown only*, and could not be questioned by Penn. Within the circle there was, before the revolution, but one island, called Reedy island, and that was always in the possession of Penn. But the learned judge's doctrine as to prescription may well be questioned.

The grant of an island by the proprietors of New Jersey, and subsequent possession for many years under the grant, might give title to the island, good against the legal owner; but how could such a grant and possession of an island, or several islands, sustain a title by prescription to the rest of the river and its subaqueous soil? The prescriptive title would not extend beyond the right actually enjoyed. As to the survey of the Pea Patch by the Halls, it has been already the subject of remark, and the possession under the survey, which the judge takes for granted in the case before him, is unsustained by the semblance of proof in this.

We come now to another extraordinary position assumed by the learned judge on which he finally decides against the State of Delaware, on the ground that by an act of the legislature of Delaware, passed in 1794, she repudiated and renounced the title of the Penns, and therefore could not maintain her territorial limits by virtue of any grant made to William Penn.

The doctrine is, that Delaware, on becoming a State, had a right to elect whether she would hold title under the Penns or under the crown, and that by the act of her legislature in 1794, she did elect to hold under the crown, and by so doing repudiated the Penn title, and could not use it to define her boundaries.

One finds it difficult to comprehend what is meant by the right of election, or from whence it is derived. But if she had a right of election, there must have been some other party who could call upon her to make that election. Surely, no such right existed in the State of New Jersey, or in any other State, and the doctrine is but a flight of fancy on the part of the learned judge.

The revolution, as has been previously stated, altered only the political condition and not the territorial limits of any State. The colony of Delaware in 1776, became the State of Delaware, and in regard to Delaware, as in regard to all the other thirteen States, you must ascertain her boundaries as a colony to define them as a State. Delaware became a State in 1776, and her boundaries were then fixed; and how could those boundaries be changed eighteen years afterwards by this act of the legislature?

The learned judge says: "*On becoming a State*" she had the right of election, but such election was not made till 1794. What then were her boundaries in 1776? Clearly, the boundaries cast upon her as a State when she emerged from her colonial condition.

Delaware was under a proprietary government as a colony, and the Penns retained the "jura regalia;" and according to the ruling of the Supreme Court, in Martin, et al., *vs.* Waddell, the jura regalia passed to the people of Delaware in 1776; and if they passed, it surely was over the whole territory, land, or water within the grant to Penn.

I trust that I have already established her colonial boundaries, and in reference to the western boundary, which had so long been in dispute between the Penns and Lord Baltimore, the very colonial legislature, who elected the delegates from Delaware to the Congress of 1776, passed an act of assembly on the 2d of September, 1775, ratifying the western boundary as settled finally between the Penns and Lord Baltimore, and making a new division between the counties of the State, rendered necessary by the accession of land on her western border.—1 Del. Laws, 567.

If, then, the boundaries of the colony became the boundaries of the State in 1776, how could any act of the legislature in 1794 change those boundaries?

The effect of this doctrine would be to make the legislature of Delaware do indirectly what they could not do by an express grant to, or agreement with, New Jersey.

By the constitution of the United States, art. 1, sec. 10, no State can enter into any agreement or compact with another State, without the consent of Congress, and the State of Delaware could not, in 1794, by any direct agreement or compact with New Jersey, cede any part of her soil, subaqueous or otherwise, to New Jersey, without the consent of Congress. Upon what principle then could she indirectly cede her territory to New Jersey in 1794?

It may also be well doubted whether the legislature of Delaware has any authority, under the constitution of the State, to dismember her territory, and yet the mode in which the act of 1794, according to the learned judge's view, operated, was to exclude one-half the river from the limits of the State, and transfer it to New Jersey.

For if the whole river belonged to Delaware within the circle in 1776, which, for the purpose of this part of his decision, the judge admits, the law of 1794 operated, if at all, to cede one-half the river to New Jersey. It is submitted that it could have no such effect.

But in point of fact, the State of Delaware never did repudiate the title of the Penns antecedent to the revolution.

The object and intent of the law of 1794 was to confiscate the quit rents of the Penns, and take possession of all vacant and ungranted lands in the State. It is perfectly immaterial whether, after the treaty of 1794 between Great Britain and the United States was ratified, Delaware could deprive the Penns of their private rights of property. That was a question between the Penns and Delaware, and has been long since settled.

The act of 1794, 2 Del. Laws, 1174, is a supplement to the act of 1793, 2 Del. Laws, 1793. And being in pari materia, they must be construed together. The act of 1793 was passed to open a land office for the sale of vacant and uncultivated lands. The State had come out of the revolution embarrassed by debt, and the vacant lands within her boundaries she naturally looked to as a mode of payment.

The act expressly confirms all titles under warrants issued before the year 1776; sec. 8. Is this a repudiation of the Penn title? And in sec. 10 and 11, a previous act, which had prohibited the issuing of warrants after 1776, is repealed, and all titles under any warrant issued before January, 1792, where the warrant had been located, are confirmed. This is more like an affirmation than repudiation of the Penn title.

The learned judge's notion of repudiation is drawn altogether from the preamble of the act of 1794, and if he had read the body of the act, he would have found that all grants, patents, and warrants, issued either by the duke of York or the Penns, previous to 1760, are confirmed, and the quit rents abrogated. He would also have found that in the 2d section authority is given to grant patents from the State on all warrants issued before 1776, which is an express affirmation of the Penn grants prior to the revolution. Indeed, the only matter of surprise is how any such conclusion as an intention to repudiate the Penn title, can be drawn from the law. The law does confiscate the quit rents, and appropriates the vacant lands to the use of the State, but with that New Jersey has no connexion. But how does the act operate as a repudiation of title in favor of New Jersey, be its terms whatever they may? Certainly not by estoppel, as all estoppels must be natural. 3 Bing. N. C. 69, Gaunt *vs.* Wairman.

The law had no relation to New Jersey, and did not affect her rights. It could not extend the boundaries of Delaware as against New Jersey, and neither can it curtail them in favor of New Jersey; and, indeed, it has no possible legal relation to the boundaries of the State. It affected all lands within her limits, but did not purport to alter, and could not alter those limits.

Virginia passed a similar act to that of Delaware as to land in the northern neck, and it never was pretended that such an act altered her chartered limits. Fairfax devisee *vs.* Hunter's lessee, 7 Cranch, 603, 632.

The act of Delaware was a domestic act intended to regulate the rights of property within her own limits. The States of this Union,

subject to the restrictions of the federal constitution, are sovereign and independent States—foreign States as to each other. By what principle of the law of nations can one State notice or take advantage of the domestic regulations of another State which have no relation to her interests or rights? No authority but that of the learned judge can, I apprehend, be found in support of such a doctrine, and he certainly has cited none to sustain him.

I conclude, therefore, that the title to the river Delaware, its soil, and the islands within the circle, was before the revolution in the Penns as proprietaries of the colony of Delaware, and that the revolution of 1776 transferred all the rights of the Penns, over the river and its soil, to the State of Delaware.

The Pea Patch island must have appeared above water somewhere between 1777 and 1780, as it is marked as a shoal on the map produced on the other side, and it was barely visible in 1780.

It is within the twelve mile circle, and, as at the time it arose the State of Delaware was the owner of the subaqueous soil from which it rose, the island became of her propriety, and, by her cession to the United States in 1813, the title vested in them.

If the view I have taken of this case be correct, the second question becomes immaterial, and with the confident reliance I have upon the title of Delaware to the whole river for twelve miles above and below Newcastle, I should not be unwilling to leave the title of the United States dependent upon that title alone. My colleague, however, lays greater stress upon the second question, and I shall, therefore, briefly state the position assumed in reference to it.

Supposing the boundaries of the State of Delaware not to include the river Delaware within the twelve mile circle, then New Jersey and Delaware each hold ad filum aquæ. The question is, to which State does the Pea Patch then belong? The island is certainly somewhat nearer to New Jersey than Delaware, but not the whole island; and if the rule adopted is, to take the distance from the shore to the middle of the river, the island would be unequally divided, the United States being entitled under Delaware to about one-fourth, and the claimant under New Jersey to three-fourth parts thereof. The rule, however, as to the propriety of islands so situated, is not satisfactorily settled. Chancellor Kent lays down the rule thus: "Where islands are situated so as to cover the middle of the river, they would belong in severalty to the owners on each side, according to the original dividing line, or filum aquæ, continued on from the place where the waters begin to divide." 3 Kent's Comm., 428.

Under this rule, the island would become divisible; in what exact proportions, the evidence before your honor does not enable us to determine. Another rule, however, which has been adopted by Judge Baldwin, has convenience and reason in its favor; and that rule is, that the main channel is the dividing line of a river, and on whichever side of the main channel the island lies, it will be of the propriety of the State on the same side of the channel. The evidence as to the main channel is conflicting. By the evi-

dence of three surveys accurately made by the officers of the United States in 1819, 1834 and 1846, respectively, the eastern channel, between New Jersey and the island, is the broadest and deepest and straighest channel. On the other side, one or two pilots, and many skippers, have been examined, whose statements have been mainly in favor of the western channel as the main channel.

I shall leave this evidence on its relative weight before your honor, reviewed as it will be more fully by my colleague.

I have closed my argument on behalf of the United States, and I have to thank your honor for the patience with which you have listened to a discussion which has been prolonged much beyond my expectation. I thought it, however, but justice to the other side, that every point should be fully presented in the opening argument, and the importance of the case also, together with the adverse opinion of Judge Baldwin on a former trial, rendered a more elementary examination of some questions expedient, than under other circumstances would have been deemed necessary. Every judicial opinion has some weight attached to it, and the extraordinary views of Judge Baldwin made it an incumbent duty to investigate fully the positions of law laid down by him, and their application to the case.

In the course of the trial, some remark fell from one of my learned opponents as to the excitement which appeared to exist between the citizens of Delaware and New Jersey in reference to the title to this island. For my own part, I can only reply, that in common with most of the citizens of Delaware, I entertain a very strong conviction of the valadity of her title, and that in Delaware generally the right of the State to the river within the circle to low water mark on the Jersey shore, is a received opinion, which no one supposes could be questioned. We look upon that right (to use the language of Lord Hale) as one of the flowers, not of her prerogative, but her sovereignty, and no son of hers would willingly see it perish or fade. Beyond this, I am conscious of no excitement, though I think a comparison might well be challenged between the course of Delaware and New Jersey in reference to this island. In 1813, during the war, Delaware granted it *gratuitously* to the United States, (without remonstrance or claim on the part of New Jersey,) in order that a fort might be erected, affording a common protection to both States and this beautiful city. The government erected that fort, and it had been destroyed by fire, and after the lapse of eighteen years, New Jersey made a *gratuitous* grant in support of a *speculative* claim, which has caused the shores of the Delaware to remain unprotected since 1831, and had a collision with Great Britain, which a short time back appeared so probable taken place, not on Delaware would have rested the desolation and ruin w ich might have visited the people on both banks of the river from its defenceless condition. So strong is my conviction of the title of my native State, that, if I stood alone in this cause, and the decision were adverse to the United States, I should always feel that they had failed from the inability of their advocate, and not from any defect in the justice of their cause; but

with the acknowledged powers and commanding intellect of my colleague to sustain the positions I have assumed, I cannot fear even the assault of my learned opponents, with all their experience, eloquence, and legal lore. I may, however, in closing my connexion with the cause, further say, that all the United States desire is a decision of their rights according to the principles of law and equity, and it is to be hoped that the claimant seeks no more.

February 1, 1848.

On Thursday, 27th of this month, I was informed, by General Eaton, that you desired to communicate to the Congress the arguments of counsel along with the award in the case of the Pea Patch; that Messrs. Clayton and Bayard would furnish theirs; that he had furnished his, and that the communication was awaiting my argument. This was the first intimation that I had of such intention and desire. Not being in possession of my notes of the documents, facts, and points of law thence resulting, nor of the citations of adjudged cases, and other authorities to sustain the legal positions to which I spoke, (except two very small fragments,) it is impossible for me to attempt to write out even an abstract of my argument from memory, without injustice to the cause which I advocated.

So far as my memory serves me, and my time will permit, I will endeavor to give you a general outline of my argument, which cost me three weeks of labor before the hearing commenced, and all the spare time I could command during the month of its pendency.

On the hearing of the parties by the arbitrator, General Eaton offered in evidence the report of the Secretary of War to the Senate of the United States, dated January 27, 1838; Senate document No. 140, of 2d session, 25th Congress, vol. 3, 1837–'38.

To this the counsel for the United States objected.

I cited Stainer *vs.* the Burgesses of Droitwich, 1 Salk., 281, to shew how far history, &c., is evidence, and contended this was a history, a narration, a confession by the government itself, by the War Department of the government, to a legislative branch of the government, and therefore ought to be received, valere quantum potest.

The arbitrator rejected the document, and every part of it.

The counsel for Mr. Humphrey (who is the representative of Dr. Henry Gale, deriving title from and under him) gave in evidence the record of the ejectment, trial, verdict, and judgment, duly certified, wherein the lessee of Henry Gale was plaintiff *vs.* Edw. Belinge, defendant, and proved that Belinge was the engineer of the United States, in possession under the United States, and that the defence was made for the United States by Belinge and by the attorney for the United States for the district of New Jersey, Mr. Green; and thereupon offered in evidence the depositions of M. E. Hall and J. E. Brown, taken upon cross-examination, and read on

the trial of that ejectment, and proved that the witnesses were dead.

To this evidence the counsel of the United States objected.

I cited authorities to prove that depositions in a former trial were evidence; that an ejectment was a fictitious action between fictitious parties, to try the right of possession between the real parties prosecuting and defending; and that the courts took notice of who were the real parties in interest, although not named in the record. Dutchess Kingston's case, 11 State Trials, 261, (Cobbet's edition, vol. 20, p. ;) Aslin *vs.* Parker, 2 Burr, 666; Rex *vs.* Pancross Peakes, N. P., 219; Rex *vs.* Townshend, 2 Doug., 421; 3 East, 364, 365; the King *vs.* Carpenter, 2 Shower, 48; Bird *vs.* Randall, 3 Burr, 1353, 6 T. R., 609; Gilbert's Evidence, p. 20, to 36 and 68; Bull, N. P., 231, 232; 12 Venir Evidence, (Fb.,) p. 218, plea 35—p 221, plea 35; 3 Comyn Digest, Evidence, (A,) 281; Gilbert's Evidence, 30 to 36; Pillipps's Evidence, 287; Calhoun lessee *vs.* Dunning, 4 Dill, 121.

That there is a difference between pleading the verdict and judgment in bar and estoppel and giving it in evidence, but not as conclusive.

The known usage is, in cases of suits by importers against collectors of ports for illegal duties, that the suits are of necessity instituted in the State courts, where difference of citizenship does not authorize the suits to be brought in the federal courts. Upon affidavit, and motion of the attorney of the United States, that the government is interested and bound to pay the damages if the collector be condemned, the suits are removed into the federal courts and there tried. Upon the decision of the court and jury against the collector, for charging illegal duties, the damages are paid by the United States, and treasury instructions thereafter are conformed to the decision of the court, either of original jurisdiction or of the Supreme court, if the government shall think proper to carry up the case to the Supreme court.

The distinction between being a party named in the record and a party in interest defending, where the United States are defending their officers and servants, whilst their officers and servants are the nominal parties, exists in the nature of things and in usage.

That "the king can do no wrong cannot be a disseissor, nor be a trespasser," are maxims of the law. But yet the agents and servants of the king are held responsible for acts of disseisin and trespass committed against law, and by the king's illegal commands.

The officers and servants of the king are not justified to commit disseissin or trespass by command of the king. Although the king cannot be sued for such; yet his ministers and agents and servants are responsible and amenable to the law. The command of the king, the approbation of the king, to disseissins and trespasses, does not make such unlawful wrongful acts lawful and rightful. The king can acquire no right by disseissin and wrong. The meaning of the maxim of royal prerogative, "the king can do no wrong," is, that wrong is not to be imputed to him personally, but

to his ministers, agents, and servants who commit the wrongful acts, and they are responsible to the person aggrieved.

The arbitrator rejected the depositions of the deceased witnesses, because the United States could not be sued as a defendant—could not be made a defendant.

That decision I consider as over nice and technical. It does not look to the real truth and justice of the case, but stops short of it, hœret in muscus corticis. It does not reach the kernel and fruit of the law, but is content with the shell. The document No. 140, before referred to, shows that the Secretary of War was apprized of the pending ejectment; of the defence made by the district attorney of the United States; that the Attorney General was consulted about sueing a writ of error to the Supreme Court of the United States; and advised that it would not be successful. (See his opinion, document aforesaid, No. 140, p. 37, letter C, of 18th November, 1837.) After the decision in this ejectment, in which the points decided by the court were reserved for review in the Supreme Court, if the United States had thought fit to sue a writ of error, and after the Attorney General had declined to prosecute a writ of error, a writ of possession was sued out, and the persons in possession, the "employees" of the United States, took a lease and became the tenants of Mr. Hudson, who married a daughter of Dr. Gale, (then dead,) and who held the title. This was sanctioned by the Secretary of War.

To escape from the force and effect of this execution of the writ of habere facias possessionem, and the lease taken, the United States, by their attorney, instituted an ejectment in the court of the United States for the circuit and district of Delaware, had it served upon their own "employees," who, of course, made no defence, and a judgment by default was taken in ten days after service of the declaration in ejectment, the adversary claimant, Hudson, having no notice. Under this judgment a writ of possession was sued, a colorable execution of the writ was made, by shewing it to the tenants then actually in the employ of the United States, (as they were when served with the declaration in ejectment,) and not a thing, nor a man, was removed by virtue of this snap judgment. The United States sued themselves, took judgment against themselves, and executed a writ of possession to put themselves in possession of what they held before exactly as they did after this writ of possession. Such a proceeding by the officers of the United States cannot, in reason, law, and equity, prejudice the rights of those holding under Dr. Gales's title, his judgment in ejectment, and the lease taken by the United States, by the employees of the government, approved by the Secretary of the Department of War.

The private right to the Pea Patch island, is derived by a survey made of 27th October, 1784, by the deputy surveyor general of the council of proprietors of New Jersey, for Edward and Clement Hall, approved and recorded, November 3, 1784, which was a grant of the land, according to the laws of New Jersey, and the decisions of the courts of New Jersey, which were cited; for the State of New Jersey has always acknowledged the rights of the proprietors

of New Jersey according to the original grant of the duke of York to Lord Berkeley and Sir George Carteret, 1664, and their alienees.

Under this grant, of 1784, Edward and Clement Hall, the grantees, entered and staked it out, according to the deposition of Morris Hall, and continued in possession until it was sold by them or their representatives to Dr. Henry Gale, who entered into possession. Dr. Gale used it as a fishery; built a house upon it in 1813, for lodging and cooking, for the persons employed by him in the fishery. By articles of agreement, of 20th February, 1813, under seal, between Henry Gale and James C. Samiento, among other things, the said Gale let the fishery of the island to said Samiento, for ten years from and after the 20th February, 1814, for fishing; said Samiento to fish one net, Henry Gale one, and Anthony R. Gale one; to be fished alternately, if said Henry and Anthony should choose to so do.

In December, 1814, by an order of a military officer of the United States, one hundred soldiers and forty workmen took possession of the Pea Patch. This was not done by an order of the Secretary of War, so far as appeared on the trial. Previous to this time, however, the Secretary of War had been negotiating with the corporations of Philadelphia and Wilmington, to advance money to the government of the United States, promising to expend the whole upon fortifications on the Pea Patch island and adjacent, as soon as the private right to the island could be obtained. This private right of Dr. Gale was known to the Secretary of War, not only by the actual possession of Dr. Gale, which was legal notice to every body, but by a proposition made to Dr. Gale for the purchase, Dr. Gale being then on the island. This proposal to purchase was by General Bloomfield, (commanding the forces in that quarter and charged with the defence of the Delaware river against the British forces.)

The actual notice which the Secretary of War had of Dr. Gale's claim, before this order issued for taking possession by the military, appears by the letter before alluded to, of record in the War Department, a certified copy whereof was read on the trial before the arbitrator.

In the correspondence between the War Department and J. T. Hudson, (holding the title from Dr. Gale,) it appears that for twenty years before that time, Dr. Gale and his representatives had been seeking compensation for this island of which he had been disseissed by military force. That by an agreement between the Secretary of War and Henry Gale, the Secretary of War had agreed to give Dr. Gale $17,000 for his title; provided the Congress would make the appropriation. This agreement bears date 18th February, 1831, and was on the next day communicated, by the President, to the Congress by a message of that date. (See document No. 140, aforementioned, pp. 18, 19.) On the 20th January, 1832, the subject was again presented to Congress, by a message of President Jackson, inviting the attention of the Congress to the proposed compromise.

Other agreements were made with Dr. Gale, which failed for

want of an appropriation, as appears by the letter of the Engineer Department, of 14th September, 1837. (Document No. 140, p. 3.) After the judgment in ejectment, after the examination of the facts and charge to the jury had been made by Attorney General Butler, and after his letter of 18th November, 1837, to the Secretary of War, Mr. Hudson, the representative of Dr. Gale, pressed his claim for compensation, but could get no satisfaction. Finally, Mr. Humphrey, the trustee of Dr. Gale's estate, was driven, by necessity, to submit to an arbitration of a single person; to give his deed to the United States before the arbitration commenced; to forego all benefit of trial by jury, and to agree that the decision of the arbitrator should be final.

After the lapse of sixty-three years from the date and origin of the title claimed by Dr. Gale, after the lapse of thirty-two years and more, from the time of the dissesin, the heir and trustee of Dr. Gale is, of necessity, compelled, in seeking redress, to submit to the special final jurisdiction of a single judge, specially appointed by the Secretary of War, and is then called upon by the arbitrator to show a strict legal paper title.

This island made its appearance in the river, above low tide, somewhere about 1770, and has been increased ever since. The reputation of the neighborhood and tradition attributes the formation of this island to the stranding and wreck of a vessel on the bar, laden with peas. In 1784, when the survey was made for C. and E. Hall, the island was much nearer to the Jersey shore than now. That shore has been continually washing away since the formation of the island. The main channel of the river, the greatest volume of water, and greatest depth of water then, was next the Delaware shore. The channel has of late years considerably widened and deepened next the Jersey shore. But the island is yet nearest the Jersey shore, and the widest, safest ship channel, and that now generally used by large vessels, is between the island and the Delaware shore. The maps and soundings for pilotage made in 1777, and about that day, show the channel as being between the Pea Patch island and the Delaware shore, and that the water next to the Jersey shore was shoal.

Although the public jurisdiction between two States, on opposite sides of the river, having the river as their common arcifinious boundary, changes with the channel of the river, yet private rights acquired under the proper jurisdiction, before the change in the channel, are not annulled by the change of the current, nor transferred as public domain to the other jurisdiction. The private right of property remains valid and secure through all changes of the channel of the river, if the land be not submerged or washed away.

The question then is, where was the channel and jurisdiction in 1784, when the grant issued from the authorities of New Jersey to C. and E. Hall; not where it may, in 1847, after the changes which sixty-two years and more have worked. Upon that subject the proof, by charts and testimony of witnesses, is clear and conclusive that the island then was much nearest to the Jersey shore, and that

the main ship channel was between the island and the Delaware shore.

The possession and claim of property by the two Halls was the first ever taken of this island, and the possession never was in any but the said C. and E. Hall and their representatives, and Dr. Gale, who purchased from them, until the United States, by the military order, entered upon the island in or about the latter part of the year 1814.

That possession itself for thirty years was a good title by prescription against the heirs of Wm. Penn, by the laws of Jersey as well as by the laws of Delaware.

No claim of jurisdiction was ever made to this island by the proprietors of Delaware, or by that State, until the grant made on the 27th May, 1813, by the State of Delaware to the United States. Dr. Gale being then in actual possession, and having his fishing hut on the island, claiming and holding, under the conveyances from C. and E. Hall, and under the grant of 1784, as within the jurisdiction of New Jersey.

The grant to the United States from the State of Delaware was not sought or authorized by any act of Congress.

The military order for taking possession in 1814 was not authorized by any act of Congress. It was not issued from the War Department. It was the mere act of a subordinate military officer.

C. and E. Hall had the first and only possession. It was regularly transmitted and handed down continually through them to Dr. Gale, and by him held at the time when Delaware made the grant, and when the military force of the United States entered upon a full possession. The building of the house, and the lease to Samiento, showed the continuous claim of property, and repels any intention to abandon; and the claim against the United States has been continual and persevering.

It is not necessary to shew a paper title. Possession is a sufficient title of itself when so long held.

Possession, notoriously adverse to all the world, by one claiming as proprietor in fee simple, is of itself sufficient to make prescription begin to run, although the claim and color of title be "merely void." Ewing *vs.* Burnett, 11 Peters, 54; Harpenden *vs.* the Dutch Church, 16 Peters, 492.

Even against the crown, length of possession is a bar, (notwithstanding the odious doctrine of nullum tempus occurrit regi,) not by applying the statute of limitations eo nomine, but by presuming a grant from the mere fact of the length of possession, although the paper title produced be void, or though none at all be produced. Grimes *vs.* Smith, 12 Coke, 4; Beedle *vs.* Beard and Wingfield, 12 Coke, 5; Powell *vs.* Millebanke, Low Purbeck's case, King *vs.* Brown, and Mayor of Hull *vs.* Horner, 1 Cowper, 102, 103; Rex *vs.* Carpenter, 2 Shower, 48; Hillary *vs.* Waller, 12 Vez., 265, 267.

The case of Powell *vs.* Millebanke was upon a period of sixty-three years of enjoyment of the advowson of Chester le Street Church, in the Bishopric of Durham, upon two presentations by the Millebanke family, and a grant from the crown was presumed;

that relied on and produced as the title, containing an express exception of the advowson from the estate conveyed.

In the principal case of the Mayor of Kingston *vs.* Horner, Lord Mansfield takes the distinction between "length of time, which operates as a *bar*, and that which operates and is used only by way of evidence." The same distinction is taken in Hillary *vs.* Waller, by Lord Erskine, shewing that claims are barred by presumption and length of time, to which the statute of limitations does not apply; as bonds, mortgages, bills in equity, and informations in the nature of quo warranto by the king.

Prescription applies as well between nations as between individuals, and more necessarily between nations, because of the serious consequences attending quarrels between nations. It is derived from the law of nature, and is a part of the law of nations.

Grotius de jure Belli et Pacis, book 2, ch. 4, p. 173 to 181; Vattel, book, ch. 11, p. 174 to 178.

The disseisin committed upon Dr. Gale cannot prejudice his right, even if the lands had been occupied for forty years. Litt., sect. 427, 430; Co. Litt., 256, 257.

An entry in law by continual claim is equivalent to an entry in deed, and entitles the disseissee to damages, with a continuendo for all the mean occupation; so that the occupation of the disseisor is to the use of the disseissee. Litt., sect. 430; Co. Litt., 257.

A subject may gain a title against a subject by disseisin and descent, but the king cannot; for he can do no wrong. The prerogative of the king cannot do a tort to a subject. He cannot be usurper of a church, nor can he be a disseisor of land. 16 Viner, prero. of king, (T,) p. 564, plea 29; 2 Institute, 681; Willion *vs.* Berkeley, Plowdon, 246.

From these doctrines and decisions and examples, given in the cases cited, it appears that the disseisin committed by the government ought not to wrong or prejudice Dr. Gale and those claiming under him; nor be any protection to those persons who were upon the land, from being sued in the ejectment brought by the lessee of to Gale; nor break the continuity of Dr. Gale's possession; nor harm his right and title. The whole possession must be accounted for Dr. Gale and his heirs, &c., from the time of the disseisin; and so the title is good by length of time, which has ripened his possession, and that of his heirs, &c., into a complete right against all the world. 2 Black. Com., chap 13, 198, 199.

New Jersey was a proprietary government, originally under letters patent, from King Charles II. to James, duke of York, bearing date 12th March, 1664, for a large tract of country, including the main land of New England from St. Croix, and the main land between the two rivers, Connecticut and Hudson, and all the land from the west side of the Connecticut to the east side of Delaware bay. And, also, all those several islands, called Martin's Vineyard and Nantucket, "together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, waters, lakes, fishings, hawkings, huntings, fowlings, and all other royalties, profits, commodities, and hereditaments to the said several lands and premises

belonging and appertaining, with their, and every of their appurtenances," to have and to hold of the king after his manor of East Greenwicke, to the said James, duke of York, his heirs and assigns forever.

By these letters patent all the powers of government are granted, so that the laws to be made shall be not repugnant to the laws and statutes of England.

By deed of conveyance, of 24th June, 1664, James, duke of York, granted to Lord Berkeley and Sir E. Carteret the lands and powers of government, bounded by Manhitas island, eastward by the main sea, and part by Hudson's river, "and back upon the west Delaware bay, and extending southward to the main ocean as far as Cape May at the mouth of Delaware bay, and northward as far as the northernmost branch of said bay or river, which is 41° 40″ of latitude, and crosseth over thence a straight line to Hudson's river in 41° of latitude," to be called New Jersey, with all rivers, mines, minerals, fishings, fowlings, and all other royalties, profits, commodities, to the premises appertaining, as fully as granted to said James, duke of York, by King Charles.

After the conquest of the Dutch and Swedes, who held the country of Long island and New York, and on the river Delaware, and after the treaty between Great Britain and the Netherlands, King Charles II., by letters patent, dated 29th June, 1674, confirmed his former letters patent to the duke of York, who, thereafter, by several deeds, confirmed the several proprietors of east and west Jersey, according to the several deeds of partition which those proprietors had made.

The duke's deed of confirmation for west New Jersey bears date August 6, 1680, to Wm. Penn, Edward Belinge, Gawn Lowry, and N. Lucas.

Previous to this, King Charles II., by letters patent of June 13, 1674, acknowledged the rights of the proprietors of New Jersey, and of their powers of government.

King Charles the *first* had, by his letters patent, bearing date in the eighth year of his reign, granted to Lord Baltimore the tract of country called Maryland, between the ocean on the east and the bay of Chesapeake on the west, &c., &c., unto that part of the bay of Delaware on the north which lieth under the fortieth degree of north latitude, from the equinoctial line, where New England is terminated. And the tract of country passing from said Delaware bay in a right line "unto the true meridian of the first fountain of the river Pottowmack;" thence down that river to a certain place called Cinquick, near the mouth of said river in the bay of Chesapeake; thence by the shortest line to Watkins's point, so that all the land divided by said line between the main ocean and Watkins's point be excepted.

And to Lord Baltimore were likewise granted all islands, rivers, fishings, fowlings, islands, and all other royalties, &c., with the powers of government, to hold of the crown, &c.

By these royal charters two colonial proprietary governments were created, by the crown of Great Britain, having the Delaware

bay or river as a common arcifinious boundary between them; Maryland having all the country bordering on the west side of the Delaware bay or river, and New Jersey having the country bordering on the east of the same river or bay.

According to the established law of nations, each colony having such arcifinious boundary extended in jurisdiction to the middle of the bay or river, "*ad medium filum aquæ*," to the middle line of the channel.

The rule of international law is:

"If neither the one nor the other of the two nations, bordering on the river, can prove that it settled first in those countries, it is to be supposed that they both came there at the same time, since neither can give any reason of preference; and in this case the dominion of each will be extended to the middle of the river.

"If the country which borders on a river has no other limits than the river itself, it is in the number of territories that have natural or indetermined limits, (territoria arcifinia,) and it enjoys the right of alluvion.

"For if I take possession of a territory, declaring that I will have it limited by the river which washes it; or if it be given upon this footing, I, by this means, enjoy the right of alluvion.

"In case of doubt, every country lying upon a river is presumed to have no other limits but the river; because nothing is more natural than to take a river for a boundary when a State is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and most probable.

"There are three sorts of lands; one sort is limited, because it is enclosed by limits made by the hands of man; another is comprised within some certain determinate measure, as hundreds, suppose, and acres; and a third is arcifinious; called so, because it has boundaries fit to keep the enemy out, *fines arundis hostibus*.

In arcifinious land, the river, by gradually altering its course, does also alter the borders of the territory; and whatever the river adds on one side, shall be under his jurisdiction who has his lands there; because both nations, between which the river runs, are supposed to have taken originally the middle of the river for a natural boundary."

Grotius, of War and Peace, book 2, chapter 3, pp. 161, 169 and 171; Vattell, book 1, chapter 22, sections 267, 268, 269, 275, 276, 277, pp. 111, 112; Handley, vs. Anthony, 5; Wheat, 375.

Barbeyrae and Gronovius derive arcifinious boundaries "ab arundis finibus," because such lands had no boundaries fixed and determined by any certain measure.

It is not doubtful in matter of general history, and documentary evidence, that the colony of New Jersey is older than the colony of Delaware. In the political family register of nations in British America, New Jersey is older, in her political birth as a colony, than her sister Delaware. There is no just foundation for this claim, set up by this younger sister Delaware, to exclude her elder sister New Jersey from that equality and natural partition of pro-

perty in the river which runs between them, which is the birthright of nations.

The water of the river, or of the sea, so far as it may be appropriated by a nation, becomes the property of the nation "as a dependence on the country it possesses."

Vattel, book 1, chapter 23, page 118, sections 287, 288, 289, 290.

Grotius speaks of this property, in the sea and arms of the sea, as "an appurtenance to the ground;" or "as surrounded with the land," although not on all sides.

Grotius, book 2, chapter 3, par. 8, 10; section 2, par. 13; sec. 2, pp. 162, 164, 167.

In paragraph 8, above cited, Grotius says: "It seems to appear that the property and dominion of the sea might belong to him who is in possession of the lands on both sides; though it be open above as a gulf, or above and below as a strait; provided it be not so great a part of the sea that, when compared with the lands on both sides, it cannot be supposed to be a part of them.

"And now what is lawful for one king or people, may be lawful also for two or three; if they had a mind to take possession of a sea thus enclosed within their lands; for it is in this manner that a river, which separates two different nations, has first been possessed by both and then divided."

The case of Handley vs. Anthony is relied on as confining New Jersey to low water mark, (5 Wheat., 375.)

The dissimilarity between the case of the grant by Virginia to the United States, and the grant by the royal charter to the duke of York, appear upon examination to be very material.

Virginia, owning the lands on both sides of the river Ohio, granted to the United States "the territory situate, lying and being to the northwest of the river Ohio." Not a word of islands, fishings, fowlings, and all other royalties, profits and commodities. But in making the Delaware the boundary of New Jersey, islands, fishings, fowlings and all other royalties are conveyed.

Virginia was conveying away the territory to a jurisdiction and sovereignty superior and paramount. New Jersey was held of the crown as a seignory, as a colony, the king having a controlling power..

If Virginia had used the same words in her grant to the United States, which are used in the grant of New Jersey, of islands, fishings, fowlings, and all other royalties, the jurisdiction to the middle of the river would have passed. Such words show the intent to include; the want of them, but especially the cautious words of the grant of Virginia to the United States, show the intent to exclude the river from the grant. Chief Justice Marshall therein said the rule is: "When a great river is the boundary between two nations, if the original property is in neither, and there be no convention, each holds to the middle of the river." 4 Wheat., 379; Handley vs. Anthony, 16.

Bays and rivers, as far as the tide ebbs and flows, are arms of the sea, and properly belong to the nation or nations owning the lands and shores which are washed by such arms of the sea, as being ap-

pendages and appurtenances necessary and proper to the shores and adjacent lands; indispensahly necessary to the people owning and inhabiting the country bordering on the arms of the sea.

The water itself is continually flowing and changing, and is incapable of being owned and possessed, except by a prince or nation owning the lands which enclose the arms of the sea, as appurtenances to the land, indispensable to their use, convenience, trade and commerce.

When did a nation ever claim, or have jurisdiction and domain, in an arm of the sea, without having jurisdiction or domain in any of the shores or lands which shut in such bay, river, or arm of the sea? No nation would submit to such a foreign claim of jurisdiction and domain by such a foreign nation. Such a detached, floating, flowing property, would be contrary to the law of nature and of nations.

In establishing a colony on this and on that side of the Delaware bay or river, each colony having the bay or river for a natural arcifinious boundary, it is reasonable to conclude that the jurisdiction of each colony extended to the middle line of the bay and river; so that all crimes, misdemeanors and breaches of law, committed on the water, should be cognizable in one or the other of the jurisdictions. To suppose that all offences against the laws, committed on the bay or river Delaware, were cognizable only in the courts in England, would introduce an intolerable grievance to the colonies; would require witnesses, to establish the guilt of offenders, to be transported three thousand miles across the ocean to the place of trial; encourage crimes by the facility of escape from punishment, and be pregnant with inconveniences and absurd consequences, totally unworthy of a king of Great Britain towards British subjects.

As soon as the proprietary government of New Jersey was organized, before the colony of Delaware had an existence, and ever after, the legislature of New Jersey claimed and exercised jurisdiction over the bay and river Delaware beyond low water mark on the Jersey shore.

In 1676, by the concessions and agreements between the proprietors and forty-two freeholders of New Jersey, signed by the proprietors and freeholders, Wm. Penn being himself one of the proprietors and signers, jurisdiction was claimed from the Jersey shore beyond low water mark, and convenient portions for wharves, quays, and harbors, were granted by the proprietors of New Jersey to the freeholders and inhabitants of New Jersey; and it was thereby declared that the inhabitants of west New Jersey have the liberty of fishing in the Delaware river. Various laws were passed, from time to time, regulating the fisheries, and levying duties on all boats and vessels navigating the bay and river Delaware. Neither did such laws receive the royal veto.

In 1682, the duke of York made two deeds of feoffment to Wm. Penn, (then one of the proprietors of New Jersey as a trustee,) by one of which the duke pretended to grant the lands on the Delaware bay or river, within the compass or circle of twelve miles about the town of Newcastle, and the submerged soil north of the

southernmost part of the circle; and by the other deed he pretended to grant the lands on the bay or river within a line "beginning twelve miles south from the town of Newcastle and running south to the Hoarkills, otherwise called Cape Henlopen."

By force of this deed of feoffment, for the compass or circle of twelve miles about Newcastle, the State of Delaware now claims jurisdiction over the river to low water mark on the Jersey shore.

To these deeds of the duke of York there are these objections:

1st. The lands on the west side of the river and bay, within both deeds, had been previously granted, by the royal charter of Charles I, to Lord Baltimore, being the colony of Maryland.

2d. The twelve miles circle would extend over into New Jersey, taking in a large part of the county of Salem, and all the town of Salem, in New Jersey, previously granted and confirmed to the proprietors of New Jersey.

3. There was no land on either side of the river, which was within the power or authority of the duke of York to grant: and the river had passed before to the proprietary government of Maryland, and of New Jersey respectively.

4. The duke of York had no title whatever. As the commander of the British forces in the conquest of the Dutch and Swedes he acquired no title; the lands conquered belonged to the crown of Great Britain, not only because of the conquest, but by reason of the prior title of the crown of Great Britain, as the first discoverer and possessor of the country. This principle was judicially determined in the case of Campbell *vs.* Hall, 1 Cooper, 204, 208, and in Calvin's case, 7 Coke, 17.

These two deeds were, therefore, void in the beginning, and nothing passed to Wm. Penn. The duke of York had no title, had nothing to pass, nothing to convey. So far as respects the lopping off of this circular grant, upon the previous grant to New Jersey, Penn, as a trustee, could acquire nothing in derogation of the rights of his cestui que trusts; he was fully notified that the proprietary government of New Jersey claimed and exercised jurisdiction over the river to the middle of the river, and he himself had so conceded and agreed with the freeholders and inhabitants of New Jersey in 1676. (Leaming's and Spicer's collection of New Jersey laws, &c., page 390.)

But, in 1683, the duke of York obtained, from Charles II. a royal charter to the duke for the boundaries expressed in the two deeds of feoffment, from the duke to Wm. Penn, in 1682. But the duke of York did not, after the date of the king's charter to him of 1683, make any further conveyance or assurance to Wm. Penn.

But it is said, that the royal charter to the duke of York, by operation of law, confirmed and made good Penn's title to the circular boundary, and to the lands included between the tangent to the circle and the bay of Delaware.

To this proposition there are these objections and insuperable obstacles:

1st. As to the royal charter of 1683, it could convey nothing which had been previously granted to Lord Baltimore, on the Ma-

ryland side, and to the proprietary government of New Jersey, on the Jersey side.

2d. The royal charter was void, because the king was deceived and made to include, in this charter, lands previously granted to Lord Baltimore, as well as lands previously granted to the proprietary government of New Jersey. Black. Com., book 1, chap. 7, p. 246, and book 2, chap. 21, p. 348.

3. The deeds of feoffment to Penn, being void in the beginning, could not be made good or confirmed. Quod ab initio non valet, in tractu temporis non convalescit. Bishop of Salisbury's case, 10 Coke, 62; Vernon's case, 4 Coke, 2-6; Co. Litt. 35, 352-6; Brett *vs.* Rigden, Plowden, 343 and 344; Smith *vs.* Stepleton, Plowd., 32; Noy's Maxims, 9, p. 10, old ed., 4.

This is not like the deed from Craig to Gratz, upon which the question arose in Barr *vs.* Gratz, 4 Wheat., 215. In that case, Craig had a good estate in the land when he conveyed to Gratz; Craig had a warrant, entry, and survey, upon which the grant issued in due course of law. The deed was not void, but good and valid from the beginning, and conveyed an inchoate, valid interest.

4th. The law would be made to do wrong to lord Baltimore, and to the proprietary government of New Jersey, and make a second grant of the crown conflict with former grants; whereby the rules of law and right would be authors of injury, which is the highest absurdity. The duke of York certainly could not, as a subject, nor as king, make any deed in conflict with the royal grant of Charles I. to George Calvert, Lord Baltimore, for the territory called Maryland, nor in conflict with his own previous deed to the proprietors of New Jersey. His first duty and first trust was to make good, and especially not to act inconsistently with, his first obligations and first assurances.

It is palpable that the duke of York's deeds to Penn were null and void as conveyances, for he had nothing, no estate, right, or title, to convey to Penn; no interest, legal or equitable. Neither the duke of York nor Penn could disseize their sovereign, Charles II., if he had any right, title, or interest, within the twelve miles circle to be disseized of. The king cannot be disseized, nor guilty of disseisin. 16 Viner, p. 564, pl. 29; Black. Com., vol. 1, p. 246.

The contract between Lord Baltimore and Penn of 1739, and the decree of specific execution in the first in chancery between them, made by Lord Hardwicke in 1750, 1 Vez., sen., 444, is brought in aid of Penn's title to the circular or boundary.

Penn and Lord Baltimore were the sole parties.

Who will pretend that by a suit against Lord Baltimore by Penn for specific execution, Penn could acquire, or the chancellor decree, that which Lord Baltimore never had, never agreed to convey, never had ability to convey?

It is not pretended that Lord Baltimore's royal grant for Maryland extended across the river to the low-water mark on the Jersey shore. Did Lord Baltimore, by his letters patent for land bordering on the west side of Delaware bay or river ever pretend to run

across the river and to cut into the county of Salem, in New Jersey, and take the whole town of Salem? Could Penn, as one of the proprietors and a trustee of west New Jersey, bargain with Lord Baltimore, under pretence that Lord Baltimore's grant had any such extension beyond the middle of the river? Could the proprietory of New Jersey, not party to the agreement between Penn and Lord Baltimore, not party to the suit in chancery, be divested of their rights, or be concluded by a decree for specific execution?

As far as Lord Baltimore's patent from Charles the 1st extended, and no further, the agreement between Penn and Lord Baltimore, and the decree of Lord Hardwicke, reached. It is as ridiculous to talk of getting a title by a decree against Lord Baltimore for the whole of the circle of 12 miles around New Castle, and to the whole river, and bed of the river, over to low-water mark, on the Jersey shore, as to talk of making a silk purse of a sow's ear; or as it would be to suppose that the arbitration between the United States and Mr. Humphrey, a citizen of New York, can conclude and divest the State of New Jersey of her jurisdiction, confine it to low-water mark, at the Jersey shore, and transfer the residue to the State of Delaware.

Neither Wm. Penn nor Lord Baltimore, in their agreement of 1732, had any power to contract for New Jersey; nor to compromit the rights of the colony of New Jersey by a bill and answer and decree of the court of chancery in England for specific execution of a contract to which New Jersey was not a party contracting, nor a party in the suit. Lord Hardwicke, in his opinion and decree, states the case as a matter in personam between the parties to the suit, and as not binding the tenure of the planters, nor the rights of the crown, nor the rights of any person not a party to the suit.

Various depositions have been taken of the ex-judges, ex-chancellors, &c., &c., of the State of Delaware, to prove that the State of Delaware had always exercised "*exclusive* jurisdiction" over the river Delaware within the 12 miles circle. That there is an array of great names in these depositions is most true. Nevertheless these gentlemen cannot personally know, nor pretend to know of their own knowledge, what happened in New Jersey for years before they were born; nor what happened when they were asleep. Nor did their mortal visions take in always what happened upon the river within the compass of the 12 miles; neither could they personally know what transactions were had in New Jersey whilst they were in the State of Delaware, and there transacting business. The *exclusive* jurisdiction of the State of Delaware so attempted to be proved by these depositions, is in its nature a negative; the testimony as to that amounts to nothing more than they, living in Delaware, did not know all things which had been transacted in the State of New Jersey.

The public records of New Jersey afford abundant testimony of the assertion and exercise of jurisdiction on the bay and river of Delaware, by the people of New Jersey, from the upper line of their territory, down to the mouth of the bay, without any exception, of the circle of twelve miles; of various acts of the assembly

of New Jersey, from 1676, down through the proprietary government, and the provincial government, and the State government of New Jersey. A list of those acts is not now in my possession or power. The Pea Patch island itself was the subject of suits in the orphan's court, in the common law court, and of executions, and sales under judgment, and decree of the courts of New Jersey, as shown by the records produced, and given in evidence. The affirmative acts of jurisdiction of the constituted authorities of New Jersey, which were given in evidence, are fully sufficient to rebut the negative evidence of "exclusive jurisdiction" exercised by Delaware, as attempted in the depositions. A jurisdiction exercised by one court in a variety of cases, is not proof that another jurisdiction has not acted upon other cases of like kind. The concurrent jurisdiction, exercised by the federal and State courts in the like kind of cases, is a familiar example to illustrate the truth, that a jurisdiction exercised by the federal courts, in actions by citizens of one State against citizens of another, is no evidence that the State courts have not exercised jurisdiction in actions by citizens of one State against citizens of another; nor do particular examples of such jurisdiction, exercised in the one court, and in the other, conduce to prove that either of the courts have the exclusive jurisdiction.

No people bordering on a navigable bay or river where the tide flows and ebbs, can be confined on either side to low water mark on either shore. Nature has rendered it impracticable. Wharfs, quays, docks, and other conveniences for trade and commerce must, and will, necessarily be extended beyond low water mark, so that, boats, vessels, and ships may, at all stages of the tide, lay to, and lake in, and discharge cargo and passengers. No observant man can go by water from the town of Salem, in New Jersey, to Philadelphia, without seeing these conveniences and necessary accommodations for trade and intercourse, projecting from the Jersey shore, beyond the line of low tide, into the water of sufficient depth to admit vessels to come alongside.

I have examined various maps, ancient and modern, of the State of Delaware, and have never yet found one on which the circular boundary of the State is represented as extending across the river to the opposite shore: uniformly it is represented to the margin of the shore of that State. Bradford's illustrated maps of the United States, published in Boston, executed in the best style, and with great research for accuracy and utility, represents the circular boundary of the State of Delaware, not as extending aeross the river, but describes its geographical boundaries; and among others, that it is bounded by the middle of the Delaware bay.

The map exhibited to Lord Hardwicke, in the case of Penn *vs.* Lord Baltimore, represented the circular boundary as stopping at the margin of the river, on the western shore of the river. The venerable chancellor did not suppose that his decree of specific execution between Penn and Lord Baltimore could ever be used as binding the rights of New Jersey and of the crown, to whom the proprietors of New Jersey had surrendered the powers of gov-

ernment (but not their private rights) in 1702; and which surrender had been accepted. His decree expressly negatives any such effect.

The point was pressed that Penn had no title. Lord Hardwicke finally disposed of that question in these words: "But what ends this point of want of title to convey is, that no part of the lower counties is left to be conveyed by plaintiffs to defendant, so that nothing being to pass by plaintiffs, it is not material whether they have title to convey or not."—(1 Vez, sen., p. 453, 454.) And he concludes his opinion on the merits by saying: "I am of opinion, therefore, to decree a specific performance of this agreement without prejudice to any right, &c. of the crown."—(p. 455.)

This case, of Penn *vs.* Lord Baltimore, was not evidence against Mr. Humphrey nor evidence against the State of New Jersey; the facts and the decree in that cause bind no body but the parties to that suit. As to the particular facts stated in that record and decree, taken in a case to which neither the State of New Jersey nor the crown, nor any body but the plaintiff, Penn, and the defendant, Lord Baltimore, it would be extraordinary that Mr. Humphrey and the State of New Jersey should be concluded by depositions, wherein they had no opportunity to cross-examine, no opportunity to bring countervailing testimony, no time nor place to allege and prove facts not alleged nor brought to the notice of Lord Hardwicke. Little did that great man conjecture, after the very guarded manner in which he thrice expressed himself, that the decree would bind no body but the parties to the suit; that his decree would be relied upon to put a title in Penn to the whole river Delaware to low water mark on the Jersey shore, a matter never pretended to have any color, under the royal grant of Maryland, to Lord Baltimore, the defendant, and which notion is totally inconsistent with the grant.

If Lord Baltimore's agreement had been urged, as binding him to convey the submerged soil of the river, all the town of Salem, and a great portion of the county of Salem, in New Jersey, held under the royal charters of 1664 and 1674, and asked damages because of Lord Baltimore's contracting to convey the submerged soil of the river and dry lands, in Jersey, which he had no pretence of title to; and Lord Baltimore had answered that Wm. Penn had seen and read the royal charter for Maryland; that Wm. Penn was himself one of the proprietors of New Jersey, holding under the royal charters of 1664 and 1674; that Wm. Penn himself claimed, under those charters, as valid and as giving title and jurisdiction to all the land on the Jersey shore, and as extending also into the river, including the fisheries, wharves, and all royalties; therefore, that such construction of the agreement was totally erroneous, and a fraud and imposition upon the defendant, what would have been Lord Hardwicke's decree? And, now, when none of those questions were presented, can the United States be at liberty to stretch Lord Hardwicke's decree as far as it is convenient to the interests of the United States, and bind New Jersey, and Dr. Gale's heirs and Mr. Humphrey's, by such forced construction of the decree?

The depositions taken on behalf of the United States, prove that all titles in the State of Delaware are incepted and deduced from Wm. Penn's title, and that of his heirs. Be it so. How did the State of Delaware acquire the title of Penn's heirs? There is no deed of conveyance; no grant from Penn or his heirs to the State of Delaware.

The title to the State is derived by an act of the legislature of Delaware of 1794, denouncing the claim of the proprietors "as not founded either in law or equity," and claiming all the lands as belonging to the people of the State, by virtue of the treaty of 1783, between the United States and Great Britain.

Upon this mode of asserting title these remarks are due:

1st. This confiscation act is contrary to the treaty of 1783 itself, which provides "that there shall be no future confiscations made," and by another article Congress stipulated to recommend to the States to restore confiscated estates. Moreover the constitution of the United States prohibits any State to pass any law impairing the obligation of contracts.

By the treaties between the United States and Great Britain of 1783 and of 1794, and by the constitution of the United States, the confiscation act of Delaware is null and void, and gave no title to the State.

Fairfax's devisees *vs.* Hunter, 7 Cranch, 618—627.

Dartmouth college *vs.* Woodward, 4 Wheat., 518.

Society for Propagation of Gospel *vs.* New Haven and Wheeler, 8 Wheat., 481, 482.

The State having disclaimed and denounced the title of the proprietors, cannot now resume it.

If the State took the title of the proprietors, by the act of 1795, they took it cum onere, with the statute of limitations running.

If the title to the river and the island remained in the crown, as suggested by Sir Philip Yorke, Northey, et al. then, at the declaration of independence, the middle of the river became the boundary of the two States; for the United States acquired no territory, no jurisdiction and domain.

Johnson *vs.* McIntosh, 8 Wheat., 584.

Harcourt *vs.* Gaillard, 12 Wheat., 527, 528.

The title and possession of the Pea Patch island had remained in E. and C. Hall, and their heirs, and Dr. Gale, from 1784, without disturbance, for thirty years before possession was taken by the United States by the military.

New Jersey, from 1674, had claimed and exercised jurisdiction over the river and bay without exception, without any adversary right asserted by Delaware; the first notice of any dispute of jurisdiction was by the act of Delaware in ceding the Pea Patch island to the United States, in 1813.

During the regal government, disputes of jurisdiction and boundary were cognizable by the king and council.

By the articles of confederation the Congress had the power to adjust all disputes about boundary or jurisdiction between the States, and the manner of executing that power was specially pro-

vided. That power was conferred by the constitution of the United States upon the supreme court, as a part of its original jurisdiction.

During five generations and more, for a hundred and fifty years, the jurisdiction of New Jersey had been claimed and exercised upon the river without let, hindrance, or complaint, from the colony or State of Delaware.

It has been the misfortune of Doctor Gale and his family, to have been drawn into a controversy with the United States about this island, the title and possession whereof had existed for thirty years, without notice of any adversary claim.

Doctor Gale was dispossessed by the military of the United States.

For the acceptance of the cession from the State of Delaware there was no act of the Congress.

For the taking of the possession there was no act of the Congress; no order of the President; no order of record in the War Department. The order was issued by a subordinate military officer; a hundred soldiers and forty laborers were sent to take possession.

From 1814 to this time, a period of thirty-two years and more, the military of the United States have held the possession; and, as yet, no compensation has been made.

The decision of one suit in a court of the United States, upon defence by the United States, by verdict and judgment, has been but the forerunner of another litigation. In the meantime Doctor Gale died, and those claiming by and under him have been under the necessity to submit to any terms that promised compensation. Two important witnesses have died, and their depositions, taken upon cross examination, have been rejected; the claimant was required to convey his title in advance, and to forego a trial by jury, and submit to the final arbitrament of a single arbitrator.

In a government called a government of laws and not of men, with a constitution which declares that "no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation," the island has been seized without process of law, thirty-two years have elapsed without any compensation made. "Tell it not in Gath, publish it not in the streets of Askalon, lest the daughters of the Phillistines rejoice."

A wound has been inflicted upon the constitution. No satisfaction has been made to the person aggrieved. If the island was necessary for public use and national defence, yet compensation was due, and ought to have been made promptly and justly.

A case parallel, in some respects, is recorded in the XXI. chap. II Kings. Ahab, king of Samaria, wanted the vineyard of Neboth, near unto the king's palace. By the advice of Jezabel, his wife, the king caused Neboth to be put to death, and took his vineyard. God, who punisheth injustice, and worketh out his judgments by secondary causes, caused Ahab to be pierced by an arrow in battle; the dogs licked his blood. Jezabel was eaten by dogs in the field of Jezrahel; and the house of Achab was made

like unto the house of Jeroboam, the son of Nabat, who made Israel to sin.

After the United States had, at very great expense, erected Fort Delaware on the Pea Patch island, it came to pass that a fire consumed the building.

It would seem to be prudent to consult the wise men and the oracles, whether Fort Delaware would be unto us a shield against our enemies, in times to come, if it were rebuilt, without just compensation made for the possession which was taken without process of law, and without price.

The example of this case is of exceeding great consequence. It reaches beyond the present times to future generations, *et nati naturum et qui nascentur ab illis.*

It raises a question as to the security of private possessions: Whether the Executive of the United States may deprive a citizen of his possessions by a military order, make himself master of the property, and put a heavy loss upon the citizen, unless he shall be able to protect his witnesses from death, and in the course of litigation establish a complete, connected, strict, legal paper title to the land whereof he hath been so dispossessed?

"Examples are supposed to justify the most dangerous measures; and where they do not, quite exactly, the defect is supplied by analogy. One precedent creates another. They soon accumulate and constitute law. What yesterday was fact, to-day is doctrine."

GEORGE M. BIBB.

Hon. R. H. GILLETT,
Solicitor of the Treasury.

Notes of the argument of John H. Eaton on the Pea Patch Island.

John H. Eaton who with George M. Bibb, was counsel for the defendant, commented upon the title of the United States as derived from the State of Delaware through her legislative grant, and argued that Delaware never had title, and consequently that the United States had none.

He deraigned the title to Penn from the duke of York, made August, 1682, under which feoffment deed Delaware claimed to assert the title.

England claimed the soil and territory along the river Delaware as first discoverer, but her possession had been interrupted. The Swedes occupied the western border, and to expel them, an expedition was fitted out and the country was taken from them. Immediately thereafter these feoffment deeds, by the duke of York were made to William Penn, August, 1682.

The duke being a subject at the time, his achieved conquest gave him no right to the conquered territory. A country discovered, or obtained by the arms of the sovereign, belongs exclusively to the sovereign, not the subject. The duke of York, though the sovereign afterwards, being a subject at that time of Charles II., ac-

quired no title, and could convey none to Penn; the deed was not merely voidable, but was void absolutely.

It is insisted in argument, that, though no title passed by the feoffment, yet there was a covenant of further assurance, and as the duke subsequently obtained a grant from the king, thenceforth on estoppel was interupted, and on coming to the throne, the duke of York (James the 2d,) stood seized to the use of his feoffee Penn.

That might be true, and yet this question not be affected thereby, but he insisted that the King of England could not be placed in character of royal trustee, except for the whole people of his realm; he could not stand such, in regard to individuals.

This covenant of *further assurance*, if good while he remained a subject of the realm, and might have been enforced through a court of equity, yet when he lost that character and came to the throne, the right and the remedy were both gone, and his feoffment title to Penn, originally void, not being cured precedently, the entire claim was merged in the crown; and not being afterwards re-patented, the title remained void.

B sells lands, which he does not own, and afterwards acquires title; he holds in trust for his bargainee, and his ownership may be divested. But this only can be affected by asking the interference of a court of equity. It is a rule of redress and relief, which does not operate *per se;* for awarded by a court of chancery, where all the facts can be disclosed, it will not operate at all. In the case of Gratz & Barr, 4 Wheat., 222, a specific performance was permitted to be enforced at law, but the rule so asserted by the Supreme Court is not of approved consideration with the profession, as is shown by the fact, that the opinion thus given has not been followed, and bills in chancery are still resorted to, for the purpose of enforcing a specific performance. This, though, is quite immaterial, since in regard to these feoffment deeds, no resort on either the equity or law side was ever attempted against the duke of York, whereby to conclude him as to his *further assurance* of title. Becoming king, thereafter, the enforcement of the precedent right as merged.

The case in 4th Wheat. was different from the present. Warrants had been issued; a survey had been made, and plats and certicates were returned; all was complete as to title, except the patent, which remained to be issued, and thus placed, it was agreed that the patent should come to the bargainee, or if issued to him, that he would stand seized to the use of his bargainee. Hence there was a clear equitable title; whereas that of the duke of York to Penn was wholly void, and if capable to be enforced, could not be so done without the aid of a court of equity, which has never been invoked, and which being omitted, after that James became king was incapable to be enforced.

The case of the Dutchy of Lancaster, reported in Plowden, gives assurance of this principle. This palatine county, having co-ordinate prerogative rights with the crown, came by descent to Henry the VII. But he being at the time on the throne, it would come to him not in his individual private character by descent from his

mother, but in his high corporate character as sovereign. Now, Henry was a usurper of the crown; and if time and chance should depose him from power and place, forfeiture of the estate of his kingly rights gleamed upon his view; which would not be the case, if the palatine county could come to him in individual, not in kingly right. To attain this desired end, an act of Parliament became necessary and was passed, thus clearly showing that while one rule of right enures when the heir apparent is a subject, a different rule arises when, by ascending to the throne, his private individual rights and character become merged in his kingly capacity.

Thus was it in the case, being considered, while a subject; further assurance, had Penn sought it, might have been enforced through a court of equity, but on coming to the throne, the right was merged, because incapable to be enforced.

Since our revolution, all the States have substituted for survey the registration of deeds; not so formerly. At the date of these feoffments to Penn, livery of seizen was as essential to the validity of the conveyed title as is now delivery and registering of a deed. Seizen to Penn was given by the attorney appointed for that purpose; and it is curious to observe with what marked particularity and precision his trust was performed. He made livery of Newcastle fort, by delivery of the key; of the woods, by twiggs; of the soil, by some dirt; and of the river, by a porringer of water.

These particularities so specially made out, go to show that the whole affair, and indeed the whole transaction of Penn's feoffment, was a made up, concocted affair. The absence of his grant by Charles the II., from 1684 to this time, more than 150 years, is one circumstance to induce distrust and doubt of its correctness.

The act of union of Pennsylvania and the three lower counties of Delaware, entered into in December, 1682, in which these feoffment deeds to Penn are set out, is another proof of Penn's management. How could it be, that in December, 1682, the colonial legislature of Pennsylvania and Delaware could accurately legislate as to deeds made to Penn and render them effectual and binding? Then there was no grant made. New Jersey, whose rights were assailed, was not present in their council, to object, or to agree. It may be good as between Pennsylvania and Delaware, who were present, and acting together, but it can in no wise affect the rights of New Jersey, who was not a party to the arrangement, nor ever privy. And what if the king and council gave assent to these legislative enactments, still the answer is, there was no grant and none but the parties in interest could be affected by them, of which New Jersey was not either party or privy.

He said the question to be met was, whether the island in dispute was within the jurisdictional limits of New Jersey or Delaware? The latter State had produced a long list of testimony to show that writs and process had been served at the low water of New Jersey; but, while he thought the testimony inadmissible, because the court records of all such proceedings would better disclose such matters of exercised jurisdiction, still the evidence proved nothing, because it does not appear, from anything offered, that the question

as to this right of exercised jurisdiction on the part of Delaware was ever judicially inquired into or made a question of; and hence, what is now insisted upon as constituting a right may be said to be a matter merely acquiesced in, because it failed to be judicially inquired of, or pleaded in defence, by those who were made to answer by process to the claimed jurisdiction of Delaware. A witness, who resided on the Pea Patch, states that he voted at the elections at the Red Lion, in Delaware. That, too, establishes nothing—settles nothing of right. The question rests upon a higher apex than process issued and served, or who has voted. It reposes upon this: in what jurisdiction does the island rest? and many and vast as have been the documentary titles and papers introduced, into that the question resolves itself.

Vattel, an approved writer in regard to the principles of international law, (ch. 22,) asserts that, where a navigable river separates two States, each shall hold, *ad medium fili*, the centre of the river. The Supreme Court of the United States, in various familiar cases, has declared the same thing, except where a patent issued to the one excludes it. Here there is no exclusion of this right of construction, as a reference to the claimed titles will fully explain.

It is insisted and argued that the grant to New Jersey is restricted to low water mark. Wherefore should this be inferred? In her grant, there is nothing to authorize such inference; and it should be borne in mind that, at the date of the New Jersey grant, the west side of the Delaware river was in possession of the Swedes and Dutch; and hence, is it not to be inferred that Charles the 2d intended to exclude his own subjects from a right of navigating the Delaware for the benefit of foreign disseizors of his asserted claims?

The grant to the New Jersey proprietors shows clearly its object, establishing, by its very calls, what was intended to be conveyed by the king's patent to the duke of York. Its language is too plain to be misunderstood. After prescribing and defining the general bounds of the grant, it says: "*running back upon the west Delaware bay or river.*"

If the expression in the grant had been, running back *to* Delaware bay or river, there might be plausibility in the idea argued upon that New Jersey should be halted at low water mark. But such is not the employed words of the patent. It is, from Connecticut river, "running *back;*" where to? "Upon *the west* Delaware bay or river." If the words had been, west to Delaware river, clearly the grant would have been arrested at the river, and necessarily there would have to stop; but its language is altogether different: it is, "back upon the west Delaware."

Certainly this expression could not intend that the grant to the New Jersey proprietors should rest and be confined to low water mark; or else, why did it not say, back to the Delaware bay or river? for then the matter would have been of easy and clear understanding; but such are not the words employed: they are, "running back *upon the west Delaware bay*," &c.

Now, "running back upon the west Delaware bay," &c., cannot mean running back west *to the Delaware*, for they are expressions

of very different import and meaning. The one would stop at the river, while to run back "*upon the west Delaware bay* or river" would necessarily cross them. Clearly, in the sentence, the term *west* cannot and does not mean any designation of course, but a point of termination where the call is to stop, to wit, at the west [bank] of the Delaware, &c. "Running back" west to the Delaware would have a definite meaning, and the call of the grant would be there met and be fulfilled; but running back (so the grant is) "upon the west Delaware bay or river" cannot mean *to*, but *beyond*, the river; and hence is it manifest that the New Jersey grant is not restricted to low water mark, but, *ex vi termines*, extends to the opposite, the Delaware side of the river.

Grants, like treaties and statutes, are to be construed by fair, liberal construction; but if there be such doubt resulting that nothing satisfactory or definite can be arrived at, the rigid rules of grammatical construction may be resorted to.

Now the final, last call of this grant, affecting the present question, is, running back from Connecticut river. Where to? "*Upon* the west Delaware bay or river. West to the Delaware river would confine it there; but that such was not intended is perceived by the words, upon *the west Delaware* river; and that, as the Swedes, foreigners, at that time occupied and cleared west of the Delaware river, is confirmatory that Charles the 2d, with all his weaknesses, intended no such thing.

Thus the grant of New Jersey covered and engaged all the soil east of the Delaware river "running back to the west Delaware bay or river;" while, on the Maryland side, was the grant to Lord Baltimore, which also called to run to the Delaware river, but not to cross it, and hence, in regard to his claim, there was no conflicting right with New Jersey. Each could go to the river, and *if* neither could cross, consequently the river would remain a common highway, common to both, but belonging to neither, except by the principles of international law, which constituted midway the stream to be the boundary.—Vattel, ch. 22.

But, some twenty years after, a feoffment deed, followed by a grant, was made to Wm. Penn, in March, 1683. Where was that grant to be placed? If the patent to New Jersey stretched along the east, and that to Lord Baltimore occupied the west shore of the Delaware, both being older by eighteen years or more, then clearly there was no unppropriated soil on which this latter grant of 1683 to the duke of York could repose; and consequently it was void through committed mistake of the sovereign; as, against a senior, the junior grant is ever held to have been made in mistake, and necessarily is rendered void, from inference.

It is argued, as against Lord Baltimore's title that Wm. Penn, in 1750, before Lord Hardwicke, obtained a decree in favor of the title derived to him under the duke of York's grant of 1683. Evidently this is a mistake, as the trial of the case shows—1 Vesy, sen., Rep. 444.

From a careful examination of that case, it will be seen that by nothing there decided is the present question affected. Lord Bal-

timore and Penn had covenanted as to a settlement of their boundaries, and one of the defences asserted by Baltimore was that his agreement to admit the title of Penn rested on no consideration, and therefore was not binding. Yet Lord Hardwicke held that the settlement of a provincial boundary, having for its object peace and quiet, was a good consideration.

But in regard to Penn's feoffment deed, made when the feoffor had no title, nothing is said confirmatory of it. In fact, no such question was presented. The whole inquiry upon that examination was under an application by Penn to enforce specific performance of a contract entered into with Lord Baltimore, the Maryland grantee. The grant to the duke of York, in 1683, was incidentally made reference to, but it did not form the gist of the action. The entire question before Lord Hardwicke was as to the enforcement of the specific performance of a contract between the plaintiff and defendant, in which incidental questions were spoken of, but not decided.

For example:

The chancellor says, that while the duke of York remained a subject, having obtained a grant of what he had enfeoffed Penn, he stood as a trustee; and, being afterwards king, why not then "a *royal trustee?*" His lordship asks the question, but, *ex abundencia centitla*, omits to answer it. He might have answered it on the authority of the palatine case referred to of the Duchy of Lancaster, that the king of England has a private and corporate capacity, and that rights under the one may be available, while they will be void under the other.—*Plowden's Rep.*

This case in Plowden was well and ably considered, and the conclusion arrived was that the king had a two-fold character—private and corporate. In his private, descents might be cast upon him, and he would take in private right; but, being king, his sovereign character became paramount, and he would take in that character only.

By applying this rule, it is seen that Penn never claimed against the duke of York an enforcement of his feoffment title while he was a subject; and being therefore king, the right which before could be asserted was merged to the crown.

The trial had between Penn and Lord Baltimore settled nothing of right in regard to the grant (of 1683) to the duke of York. The grant to Lord Baltimore reached to the Delaware river; and consequently, there being no vacant soil on which to place the grant made to the duke of York, it was as though it had never been made. Being made by the king in mistake, for there was no land applicable to its satisfaction, the grant was void. If, as was the case, Penn and Lord Baltimore, by agreement, made an opening along the shore of the Delaware, by which the feoffment to Penn was admitted to a location, that was not in virtue of anything arising on the face of the grant, but resulted from the compact entered into with Lord Baltimore, and could have no extension beyond what his grant secured, nor could it operate to the prejudice of the New Jersey grant.

If Penn and Baltimore had never contracted, it is clear that the

grant of 1683, and feoffment deed of August, 1682, could not have found a location, and would hence have been void. By their terms the Maryland and New Jersey grants, each calling to run to the river, would have authorised each to run to the middle of the stream. Such is the assertion of Vattel, ch. 22, and so the Supreme Court has in several instances decided, (4, 8, 9 Wheat., p. 651, 584, 189.) Of course, as neither State by its patent crossed the river, it remained a common highway, with the right of jurisdiction *ad medium fili*. Thus the matter of title stood, and so it would have continued, in regard to these States, resting on their original patents. Perceiving this, Mr. Penn procured a contract, privately entered into with Lord Baltimore, by which an opening along the Delaware river was effected for placing this grant of 1683, junior to both the others. Thus a location was obtained, through private contract, for that which, previously having none, was void, but which, being thus secured, could be protected only to the extent that the Maryland grant was concerned, and could not, by the disarrangement thus made, affect the previously admitted rights of New Jersey. The latter was not a party to this contract, and hence any right possessed by her could not be disturbed by such arrangement. The parties making it only were bound by it.

At the period of which we are speaking, livery and seizen were essential to the transfer of real estate. Even under the king's patent, entry upon the land conveyed (that is, seizen) was essential to the validity of title. Such was, in those days, the settled law. How, then, was it possible that the duke of York could *enter* upon, or William Penn have livery and seizen off, the bed of a navigable river—of an island which did not appear above the tide's surface until nearly a century after the date of the grant? If actual delivery (seizen) were necessary, and was never made, and could not be, then no title, or right, passed to the grantee or feoffee—without such formality, none did pass. *See Co. Lit.* 42, 49, 190, 240; *D. G. & R.*, 50, 51; 3 *Bibb Ky. Rep.* 63, 64.

Another inquiry material in the consideration of this question arises. Could the king of England, in his prerogative right, grant the beds of navigable streams where the tides ebb and flow, and which are thus reckoned arms of the sea? These are in trust with the king for the benefit of all the subjects of his realm, and not to be bestowed on individual monopoly. The Supreme Court has thus decided in regard to a grant from the New Jersey proprietors—that their rights and powers of government could not be extended beyond what the king could act upon in England; and the right to grant the soil under the water was refused. He cited the case of *Morton* vs. *Waddel*, 15 *Peters*.

A disclaimer of title by Delaware, as derived from any proprietory right or interest was commented on; that early as 1794, the legislature of the State had declared her title to proceed from the treaty of peace with Great Britain in 1783; and that her right of soil and sovereignty was thence derived; thus repudiating and disclaiming anything of title or right, derived through the proprie-

tory interest of William Penn. Now, in defending her sale to the United States of this island, which she at no time ever had possession of, or exercised control over, she shall not be at liberty to avoid her voluntary disclaimer of title. By the English doctrine of disclaimer, if one be attaint of treason, and to avoid a forfeiture, disclaim a right to lands and houses, though he be thereafter acquitted of the imputed crime, the disclaimer will prevent a recovery upon his after assertion of claim.

Delaware did disclaim, formally, and through her legislature, everything of right, as derived through the colonial proprietors. From this she cannot escape; she cannot fall back upon a title which she has heretofore rejected.

Delaware has title under proprietor Penn; she denies, disclaims it. Then, by the rules of settled law, she cannot unsay this formal declaration. By this legislative act, she is estopped to reject what she has solemnly declared upon.

But she says, my title is derived from the treaty of 1783. Be it so; what follows? Each and every State of this Union, then, in regard to the treaty of peace, must rest on the same ground; and if one State may assert this right, each and every other may do the same thing. So, if Delaware may throw off—disclaim everything of proprietory right—wherefore shall New Jersey not be admitted to the same fellowship; and then it will follow that, if sovereignty overshadowed Delaware in 1776, or 1783, the same thing pertained to New Jersey; and in right thereof, the question remained as before, that the midway channel of the river was the true boundary and separation of territory and jurisdiction. If by the declaration of our independence, or by the admissions of the treaty of 1783, the State of Delaware become independent and sovereign, so also did New Jersey so become; and both sovereignties coming into existence, and operating at one and the same moment, by international rule would place the middle of the river as the boundary line between them. Delaware did disclaim in 1794. See 2 vol. Revised Laws, page 1174.

Having disclaimed for any asserted title, she must repose on the sovereignty resulting to her through the revolution, for she cannot escape from the effects of her own legislative act of 1794.

If one be attaint, and, to get rid of the forfeiture, disclaims title, although he be afterwards acquitted, he shall be concluded by his plea. Standf. J. C., 186; Story's pleading, 643; Cooper's Equity Pleader, 310, 311.

Delaware enters an unqualified declaration, that titles derived under proprietors, or pretended proprietors, have no foundation in either law or equity. On the authority, then, of the decisions referred to, a disclaimer of title being entered by the whole people of the State, it cannot now be taken back; and hence, the State is estopped to assert title, under any proprietory right, derived either through the feoffment of Penn, or from his after claim, enforced through Lord Baltimore; both were repudiated, as being founded neither in law or equity, as the statute declares.

Mr. Eaton argued that the statute of limitations alone would give title, even if the fact were that the island in controversy was within the limits and jurisdiction of Delaware. The conveyance by the New Jersey proprietors, to the present claimants, was in exact conformity to the custom and laws of that State. It was true that in 1701 the government rights, conceded by the crown, were given back to Queen Ann, the then sovereign of England; but it was also true that the proprietor's right in and to the soil was not surrendered; that remained to Lord Carteret and the other proprietors of New Jersey—their governmental authority only was yielded to the crown.

This being conceded, it might be argued that thereafter the jurisdiction of New Jersey was restricted to the then existing soil within her limits, and that any alluvial island, arising along her shore, would be excluded from her proprietory grant. Be this admitted, and it by no means follows that the then colony of Delaware could lay claim to it. If any objection could arise, it would be that neither grant covered it, and hence was the island still the property of the crown; and then, under this assumption, that being nearest the shore of New Jersey, the right and jurisdiction over it would be hers, under the principles of international law and the grant of the State in 1831 —Vattel, ch. 22.

But, apart from every arising argument and consideration involved in the case, there was one final one from which the State of Delaware, grantor to the United States, could not escape.

The conveyance of Delaware to the United States, in 1814, of land never occupied, owned or possessed by her, was an act of champerty. In view of the city of Newcastle, this New Jersey grantee had occupied the island, and built a house there, and from April to August had exercised acts of open ownership over it. Not a word of complaint during the time was made; even from the year 1784 he was known to have a grant of it from the proprietors of New Jersey. For a period of thirty years following the date of this grant, Delaware had set up no claim, nor attempted, in regard to it, any acts of ownership.

Then, in 1813, possession of the island, adverse to Delaware, was had under a grant from the New Jersey proprietors, which possession has continued to the present time—a period of thirty-three years. Possession is held to be the best evidence of title, and a forcible ouster will not interrupt or toll it; for if such were not the law, titles to land would depend not on legal rule, but upon the physical strength of parties.

When the United States in 1814 entered and took possession of the island, with her hundred soldiers and fifty laborers, it was a disseisin, and the possession thus forcibly acquired was the present claimant's possession, for the statute of limitations will not commence to run in favor of a disseisor, no matter what time may elapse, until after descent to the heir be cast. While the ancestor, the disseisor, lives, his act being tortious, the statute of limitations will give no protection to his possession.—1 Salk. 335. 13 Peter's, 705.

But it is argued that the United States, in 1839, brought suit in the circuit court of Delaware, and recovered a judgment by default, and sued out the court's writ of *habere facias;* that thereafter the statute was arrested. In that there is nothing of strength whatever, and for two obvious reasons.

1st. It is shown by the record and proof that, in consequence of suit brought in the State of New Jersey, a recovery was had, and a writ of possession awarded against the United States, who, to avoid its service, consented to become tenants at will to the present claimants, and signed a covenant to that effect; to bring a posessory action under such circumstances, was to place the United States in the attitude of both plaintiff and defendant—themselves suing themselves.

2d. A judgment by default fails of any binding effect, where the landlord not being vouched, there is reason to infer collusion between the plaintiff and tenant. Here, by the positive direction from the War Department, the tenants had signed and acknowledged themselves to be tenants, and what remained of them on the island, being in the employ and subject to the orders of the government, were sued, and made default. The New Jersey claimants aver they had no notice of the suit, and there is no proof going to show that they had.

But waiving all this, still if the possession, in April, 1813, when, with thirteen hands, the claimant commenced to fish on this island, and erected thereon a house, was a valid adverse possession, then to 1839, date of this judgment was twenty-six years, and made a full completion of the statute. By the act of Delaware of 1793, it is declared: "Henceforth, no person shall make an entry into any land, but within twenty years next after his right or title descended or accrued."—*Rev. laws* p. 1153.

On the trial before Judge Baldwin, it was proven that at the date of their proprietory grant, "or shortly afterwards, the grantees took possession, and so remained in possession until it was sold to Dr. Gale." The witness being dead, a certified copy of his deposition was offered and refused. It ought to have been recorded, for the present controversy is for the same land, and although not between the same parties *eo nomine*, yet they are such substantially, which the law authorities hold to be sufficient for the admission of such testimony.

In the first New Jersey action the United States did not, by name, appear on the record, but Belin was the tenant in possession, and officer in the engineers corps, charged with the construction of the fort. The case was defended by the district attorney; exception at the trial was taken, and the record submitted, by direction of the government, to Attorney General Butler, to determine as to the prosecution of a suit of error. Thus were the United States substantially parties then, as they now are. That evidence being admitted, would have established a title by "PRESCRIPTION." But the proof being refused and there being no appellate resort from this tribunal, submission is the only alternative,

This proof, he thought, ought to have been admitted, as well

because he believed the rules of law authorized it, as because the United States, a strong and powerful opponent, against an humble individual, could not intend to avail themselves, in justification of their practised disseisen, of any course whereby the justice of the title and the equity of the parties might be overlooked; having continued their oppression until our witnesses are dead, advantage should not be taken of it. The testimony, if admitted, would give a title by prescription, which being the case, the authorities assume that once had, it could not be lost by any interruption of the possessor.—Co. Litt., 203—206.

So, too, entry and seisen of the premises under a grant, is adverse possession.—2d Sal., 423.

Thus adverse possession (seisen) being shown, even admitting the island to be in the limits of Delaware, her own statute of limitation will operate as a bar; for it does not require that the possession should be continuous, but only to be adverse. The act says, that, "henceforth, no person shall make entry, but within twenty years after the right accrued." Delaware's right accrued in 1783, for so her legislature has declared; and for twenty years thereafter, nor, indeed, for sixty or more, did she "make entry;" hence the right is barred.

It is alleged that Delaware, being a sovereign State, the statute of limitation cannot effect her. While the "*nullum tempus occurit*" does not run against the sovereign, it is difficult to perceive how it can in any wise operate advantageously to Delaware. In one of two attitudes she must stand.

In regard to the title of this island, she cannot make claim in virtue of any possessed sovereignty. Having expressly declared, in her legislative capacity, that she has no title derived to her, except through the treaty of 1783, she thereby became separated from her proprietory right, and took refuge alone under the revolution—the treaty of 1783. Delaware intended to say, what the supreme court more than once has declared, that on the 4th of July, 1776, Delaware, Jersey, also, were sovereign and independent States. Then if their respective grants did not control, make it otherwise, each was entitled to have and hold jurisdiction to the centre of the stream, in which event the permanent title of New Jersey would render a resort to the statutes unnecessary.

Already it is shown that the disclaimer of the legislature spurned the idea of a title being derived through the proprietors, that their claim was not founded in either law or equity, and *that* they cannot now unsay.

But suppose otherwise, and that reliance may be had on the proprietory right of Penn, then a title so asserted cannot place Delaware in any position different and better than the original grantee, Penn and his descendants, could occupy. The statute could be pleaded against the heirs of Penn, and thence it follows that Delaware, being assignee of the feoffee, she equally will be effected by the operation of the statute. Upon either alternative, failure as to the title results. Was she sovereign in virtue of the revolution? So is New Jersey, with the island some two hundred yards

nearest to her shore. Is her claim derivative through the feoffment deed to Penn and after grant to the duke of York? Then can she have no higher rights than Penn's descendants, and if the statute would operate against them, so also must it operate against Delaware and her barganee, the United States.

In this particular there is nothing in conflict decided by the supreme court, to which reference had been made. In 8 Peters, 252, the question as to *limitation* arose directly, and the court say, "An adverse possession of 21 years under a claim of title will bar a recovery, though the occupant have no title." See page 252, 8 Peters. And, again, same opinion, "after 21 years the bar will be complete, if the possession be *uninterrupted*," p. 254.

In the case of the Pea Patch, it is proven that possession was taken and ownership exercised certainly in 1813; not secretly and stealthfully, as is often the case with forest lands, but in full view of the authorities of Delaware; thus affording evidence that adverse possession was claimed and exercised, and no attempt was made to call it in question until the disseisin took place, through an armed force of the United States, which, as has already been shown, upon reason and authority, could not affect the original possession of 1813.

He denied that a possession to be available should be continuous for the whole time. A possession to give impulse and force to the statute certainly must be adverse, and to this end it must be an open notorious exercise of adverse ownership—an actual *possessio pedio*, either by cultivation or enclosure. The policy and reason of the law is, that some act or thing is necessary to be done, whereby to advertise any opposing claimant, against whom suit may be brought for a recovery.

Thus in Johnson's New York reports, decisions are to be met with where a mere fencing in of lots and grounds caused the statute to run. Why? Not that the adverse claimant was in actual, but was merely in constructive possession, thereby affording information that there was an opposing title, and to enable the party out of possession to bring his action to recover it. 12 John., 368.

So in the case referred to, from 8 Peters, p. 251, "the bar will be complete after 21 years, if the possession be UNINTERRUPTED."

The Jersey grantee's right never was *interrupted*; for by the expression used in the supreme court's opinion it must be intended a legal, not a *vi et armis* "interruption," such as the United States thought proper to resort to; for in making such resort, no possessory right was or could be acquired; the possession was still in and with the New Jersey claimants, because this high handed act of unauthorized power, by the United States, brought about by one hundred soldiers and fifty laborers, was a desseisin, which was incapable to change the right of property, or possession, and thus situated, the wrongful, illegal occupancy by the United States, was still the possession of the New Jersey claimants, for the reason that it was tortiously, not rightfully obtained; the law yields no assent to any result improperly and wrongfully occasioned.

If, by pronounced decisions, the placing of boards around a lot in the city is notice of an adverse possession and title, so as to

cause the statute of limitations to run—the party not living on the lot—no reasonable distinction can be drawn between such settled cases and the present. In regard to the island, fences and artificial boundaries were not called for by the reason or policy of the law. It was a little island in the middle of the river; water, on all sides, surrounded it; and these were its boundaries, to all intents that were definite, as though a board fence encircled it. On this island, of small extent, this New Jersey grantee brought his laborers, and built a house for their accommodation; the ebb and flow of the tide which washed the shore was his fence; and his erected house, no matter how humble, was proof to Delaware of an adverse possession and title.

He said no higher outrage on private right could anywhere be met with. It was a fearful contest for a poor and humble citizen to be found engaged in strife with the government. In the present case he felt the disparity to be great, the odds unequal. Every application made to the department for papers and information, calculated to elicit truth in regard to this matter, had been repulsed; and nothing had been furnished, when asked for, save through their own employed counsel, with instructions, perhaps, given, that nothing should be communicated that might militate against the claim of the United States. In justice, however, to their counsel, it is to be remarked, that throughout a spirit of propriety, justice, and frank demeanor had been observed; yet, at the same time, everything of information in favor of the New Jersey claimant had been cautiously doled out, and never given to the counsel, except when it had previously passed the revision of their own counsel. He claimed that such a course was highly censurable, and quite beneath the character of a just and liberal government towards its citizens.

That the United States have a right to take private property for public purposes, was unquestionably true; "but then just compensation shall be made." If, under this security, they may drive one from his possession for thirty-three years, and then give him, as in this case, merely a law suit to ascertain if the house he was driven from were his, it is quite an insecure reliance, and no defence to the wronged and injured citizen. If, under the constitution, property may be taken for public purposes, let it not be said that the evicted citizen shall tarry thirty-three years, and then, for his redress, be furnished with a mere expensive law inquiry. This may save money to the treasury, but certainly nothing of honor and justice to the country; and if the government cannot preserve its money and credit at a less sacrifice than this, then better were it lost at once.

Where private property is necessary to be taken for public use, a right to do so unquestionably remains with the government; but it is denied that this can be done without making just and prompt compensation. If the United States can keep the party out of a just redress for a third of a century, and, as a last alternative, give him as redress an expensive litigation, then is the right not worth

being possessed; it becomes a constitutional right merely in regard to the paper on which it is printed, and is worth no more.

The claimant, with a rightful grant, from 1784, was forcibly evicted by the United States, and possession of his property retained. At last suit was brought, and a recovery had. The United States agreed to become tenants at will, and so held; yet thereafter would they not yield the possession, though nothing but tenants; and in the end, would agree to nothing but a submission to their own chosen arbitration, after their own dictation, as to everything pertaining to the investigation. The whole is matter of duress, and while not a word of objection is interposed as to the distinguished and respectable person who has been selected for the umpirage, much might be urged as to the mode pursued on the part of the government. The odds in favor of the United States, contending with an humble citizen, surpasses all reasonable calculation; not in regard to the purity and high integrity of the umpire, but that the means and facilities of eliciting facts and truth are so unequal, that right is of difficult attainment.

He proceeded to examine the various charts of the river which had been introduced, going to show that the island was nearest to the Jersey shore, and the testimony of the numerous pilots, many of whom, for a series of years, had been engaged as such; all of whom (two excepted) concurred in saying that the main channel of navigation was on the west or Delaware side, so that whether the *medium feli* was to be controlled by the main channel, or by the actual geographic centre of the stream, the island, by the rule laid down in Vattel, belonged to New Jersey. De Barr's map, made in 1777, also laid down the main channel on the west side of the river.

Substance of the argument of John M. Clayton, of Delaware, for the United States, in the matter of the Pea Patch island, before the Hon. John Sergeant; delivered in the hall of American Independence, in the city of Philadelphia, on the second and third of December, 1847, *containing a discussion of the title of the States of Delaware and New Jersey to the river Delaware and its islands.*

[The following is the substance of the argument delivered by Mr. Clayton in the hall of Independence, in the city of Philadelphia, on Thursday and Friday, the 2d and 3d of December, 1847, before the Hon. John Sergeant, arbitrator appointed by the President of the United States; and James Humphreys, to decide the title to the Pea Patch island. As the decision will involve the jurisdiction of the States of Delaware and New Jersey for about 50 square miles of the river, and as the object is to settle the title, so as to enable the government to commence rebuilding the fortifications which were burnt in 1831, the questions discussed are of general public interest. The colonial history involved in the debate is interest-

ing. The Pea Patch is supposed to be the only point in the Delaware at which the city of Philadelphia, and the other towns on the river, can be successfully defended against a hostile fleet. In justice to Mr. C. we state, that the following is but a general abstract of his speech, and was furnished to the printer without the aid of his notes. It is believed, however, to present correctly the substance of his argument.]

Mr. C. rose and said, that he joined with his learned friend, Mr. Bibb, in the acknowledgment of the kindness which had been extended to all the counsel who had been concerned in this trial, by the civil authorities of the city, and especially for the honor of being allowed to conduct the argument of the case in the Hall of American Independence. It seemed to be an appropriate place for the discussion of the means of defending this noble city, which was, in truth, the birth place of American freedom. He tendered the hearty thanks of himself and his colleague to the city authorities for the accommodations which had been freely furnished for the hearing of the case. Those thanks were also due to the Historical and Philosophical Societies, the Athenæum, and to the Bar Association of this city, all of which have kindly furnished us with books, documents, and charts necessary for the trial. So that, on both sides, we have the benefit of libraries, yielding more information on the peculiar subject we have to discuss, than could be found in any other city of the Union. Our thanks are also due to gentlemen of the legal profession in this city; for the information furnished by two of whom, I feel bound to make some public acknowledgment; I refer to George Washington Smith and John Cadwallader, esquires. With the aids thus allowed us on both sides, we are all satisfied that we have had a fair and full trial. My learned friends on the opposite side will now acknowledge that they have been supplied with all the papers on the files of any of the offices at Washington which could bear upon the subject; and both parties may concede that the testimony in the case is so full as to develop the entire merits of the controversy.

The counsel who opened for the defence, (Hon. G. M. Bibb,) had attacked the government for its past conduct in taking possession of the Pea Patch island by military force, and expelling Dr. Gale, in the year 1813. It will by and by appear, when I come to comment upon the evidence regarding that matter, that the government in fact entered upon the island when Dr. Gale was not in possession of it, and when, for aught that appeared to the officers who occupied it, no other human being claimed or wished the possession of it. It then appeared to be a worthless mud-flat, or shoal, in the Delaware river, that could never repay to any individual the expenses of embanking it; and it is in proof that Mr. Pearce and Mr. Booth, citizens of Newcastle, who held a warrant for it from the land office in Delaware, in 1794, considering that it would never repay them the expenses of embankment, for that reason never laid their warrant upon it, or attempted to occupy it. Yet my learned friend has indulged his imagination, contrary to the usual kindness

of his nature, comparing the course of the government towards Dr. Gale to the conduct of Ahab in expelling Naboth from his vineyard, and predicting such untoward disasters to the government as befel the oppressive king of Samaria. He thought the burning of Fort Delaware on this island, which occurred in January, 1831, was an act of Providence for the punishment of the oppressor. We read that the ancient Naboth refused to sell his vineyard to the king for either land or money, because it was the inheritance of his fathers; but our modern Naboth, who speculated in the title to this island, purchasing it for a consideration nominally of a thousand dollars, and now desiring to sell it for one hundred and fifty thousand, shows none of the affection which his prototype exhibited for the inheritance of his fathers. He has been constantly struggling to sell his vineyard, or Pea Patch, for the last sixteen years, and to make a fortune by the sale of it. The vineyard he claims will, by and by, appear to be one to which neither he nor his fathers ever had a particle of title; and it already appears, by the articles of agreement which appoint the arbitrator, that he has made it a *sine qua non* in the submission, that he should in no event keep his vineyard, but that the government should take it at a valuation, even should the arbitrator award in his favor. As to the predictions and omens of ill, which my friend has adverted to, they will hardly frighten the government from its propriety on this subject. He is not Elijah the Tishbite; and we are not in danger of mistaking the flourishes of the orator for the vaticinations of the prophet.

Mr. C. then commenced his argument by a general review of the positions which had been assumed by the counsel for the claimant under the New Jersey title, and the errors into which they had fallen. He complimented his learned opponents on the ability they had shown in the discussion; but said they had greatly mistaken the claim of Delaware, if they supposed that the government of the United States, holding under her title, was bound, on this occasion, to vindicate any pretension she might set up to the exclusive jurisdiction over the waters of the bay south of the twelve-mile circle about the town of Newcastle. He would dismiss all this part of the case by stating unhesitatingly his own opinion, that each of the coterminous States bordering on the *bay* was entitled, on the settled principles of international law, to hold, *ad filum aquæ*, to the thread or middle of the stream; and that, so far, each of them holds the subaqueous soil, as well as State jurisdiction, as part of the *jura regalia* acquired by them on the declaration of independence. The charters of each of these States, below the circle, extended only to low water mark on the Delaware bay; and it was only by the application of a principle of the law of nations, and the effect by construction which the Supreme Court of the United States had given to the declaration of independence, that the jurisdiction of each, and the title of each to submarine soil, were extended to the middle of the bay.

The question now to be decided was very different. The principal inquiry here was whether the State of Delaware had not the

exclusive right to all the Delaware river, with the soil of the river, and all the islands in it, contained within the circumference of the circle whose centre was in the town of Newcastle, and whose radius extended twelve miles from that centre. But before he proceeded to the discussion of this, the main question in the cause, it became necessary for him to reverse the natural order of the argument, and inquire into the title which the demandant claims under the proprietaries and the legislature of New Jersey. His duty was that of reply to the arguments of his learned adversaries; and he would follow them in the order in which they had discussed the subject. The demandant had bound the United States by the articles of submission to purchase his title at an appraised value, provided he had the title. It is incumbent on him, therefore, to show that he has a good title, before he can rightfully ask the government to pay for it. The burthen of proof is upon him, for another reason. An exemplified record in evidence proves that the United States have recovered the island in controversy by a judgment in the fourth judicial circuit, and in the Delaware district; and that the government has been for many years in possession, under the judgment thus recovered, and an execution upon it.

I shall maintain, first, that the demandant, Mr. Humphreys, claiming under Dr. Gale, has not the New Jersey title; 2dly, that New Jersey had no title either to the Pea Patch island, or to any other part of the river, or subaqueous soil, within the limits of the circle.

First. The demandant has not the New Jersey title.

He claims, first, under a proprietary grant. He exhibits an ancient survey, or paper purporting to be a survey of the Pea Patch island, made in the year 1784, for E. & C. Hall, from whom, by sundry mesne conveyances, he derives title to himself through Doctor Gale, who had purchased the title of the Halls for five hundred or a thousand dollars. This ancient survey recites a proprietary warrant of 1743, and another of 1782, authorizing a survey of *lands*, (not of water or subaqueous soil,) to be made any where "in west Jersey below the falls of Trenton." Neither of the warrants is produced in evidence, but the survey states that the Halls had purchased 126 acres of the person holding the warrant of 1782, and 56½ acres of the person holding the warrant of 1743; making the right of the Halls, under the warrants, to locate 178½ acres of *land* somewhere *in West Jersey*. The deputy surveyor, who returns this survey to the proprietors of west Jersey, certifies that he surveyed, to fill their claim, an island in the Delaware, called the Pea Patch, containing, by computation, just 178½ acres. We know, from the actual measurement by the coast survey, that the island contains but 87.60 acres at this day. The testimony in the cause has proved that, about the year 1784, the island first appeared above low water, not larger than a "man's hat." It is quite apparent, therefore, that there was no actual survey made by virtue of these fragments of warrants. The statement of the surveyor, that the island contained 178½ acres of land in 1784, was probably made because the fragments of the warrants themselves, when added together, made just that number of acres. No course or distance is given, although

reference is made to two or three points on the Delaware and Jersey shores, which clearly demonstrate that no actual survey was ever made. For example, the mile-house on the Newcastle shore is stated to be 2½ miles from the island; when we know, by the coast survey, that it is about four miles. But, waiving all objections of this character, and considering the survey, without possession and in the absence of any patent, to be a good proprietary grant in form, I maintain that it was utterly null and void, because, at the time of the grant in 1784, the whole island was below the flow of the tide, and continued so to be, according to the evidence in the cause, until it was embanked by the government, and reclaimed from the tide, about the year 1814–'15, at the expense of probably not less than $100,000. The officer of engineers, who first took possession of the island for the government, Captain Clark, proves that, at the time he entered upon it, with one hundred soldiers and forty laborers, to construct the embankment, it was overflowed at every full tide, and so continued to be until the government had embanked it. The island was, like the shore between high and low water mark, bare at *low*, covered at *high* water mark. A question, then, to be decided by the law books is, was this land the property of the PROPRIETORS of New Jersey, while it was below the flow of the tide?

To determine this question, we must first ascertain what were the rights and powers of the proprietors of New Jersey at the time the pretended grant was made. These proprietors incept their titles to lands by the royal charter of Charles II., of the 12th March, 1664, confirmed by the charter of 1674. During the war with Holland, in 1672, the Dutch had captured and taken possession of New York, New Jersey, Pennsylvania, and Delaware. The treaty of Westminister restored the country to the English, who then held it *statu quo ante bellum*. The royal confirmation, in 1674, was made to cure any possible defect in the title arising out of the conquest of the country by the Dutch. These charters bounded the country granted by them to the duke of York, by the western shore or side of the Connecticut river, and "*by the eastern shore or side of the Delaware bay.*" The royal letters patent convey the country between the Delaware and the Connecticut, "together with the river called Hudson river, and the lands from the west side of Connecticut to the *east* side of Delaware bay." On the 23d of June, 1664, James, duke of York, conveyed to Lord Berkley and Sir George Carteret a part of the premises so granted to him by the king; that is to say, "bounded on the east, part by the main sea and part by Hudson's river, *having upon the west Delaware bay or river*, and extending southward to the main ocean, as far as Cape May, at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river Delaware, which is in forty-one degrees and forty minutes of latitude, and crossing over thence in a straight line to Hudson's river, in forty-one degrees of latitude." The subsequent conveyances to the proprietors of Jersey all bound her territory on the west *by the Delaware bay and river.*

Here Mr. C. quoted the several grants and confirmations of the territory of New Jersey by their dates and boundaries; from which it appeared that no one grant extended her western limits beyond the eastern side of the Delaware bay and river. And he cited an act of the legislature of New Jersey of 1709, dividing west Jersey into counties, bounding each of the western counties by the bay and river, and expressly limiting the jurisdiction and territory of each county "*by*" the bay or the river, and "*to*" the bay or river only.

These, said Mr. C., continued to be the limits of all these counties until the year 1822, after the claimant, Dr. Gale, had instituted a suit in New Jersey to recover the Pea Patch island, when the legislature of New Jersey extended the limits of Salem and Cumberland counties to the middle of the river. Thus, said he, after defining her own limits by her own laws, and bounding herself by the river for one hundred and thirteen years, then, and not till then, she set up a claim to half the river within the circle, which she had never attempted before. See Smith's History of New Jersey, page 497. "Salem county was named by John Fenwick, and distinguished by his tenth as a proprietor in 1675. The name and jurisdiction settled by a proprietary law, 1694. The boundaries were fixed in 1709," &c., &c. "In 1681, the commissioners for settling and regulation of lands among the proprietors of west Jersey, fixed upon certain regulations, the first of which was, that the surveyor should measure *the front of the river Delaware*, beginning at Assumpink creek, and thence down to Cape May." And the second regulation was, "that each and every tenth, or ten proprietors, shall have their proportion of front *to the river Delaware*." Smith, page 131. Cumberland county was named by Governor Belcher, in respect to the duke of Cumberland; it was divided from Salem by act of assembly in 1747, and the boundaries fixed. (*See vol.* 1 *of Laws*, *p.* 361; *Smith*, 497.)

Mr. C. then called the attention of the arbitrator to repeated adjudications deciding that the State of New Jersey had no title, by the royal grants, to the Delaware river. He cited the case of Corfield *vs.* Coryell, decided by Judge Washington, in the circuit court held in New Jersey in the year 1823, reported in 4 Washington Reports; and the case of Bennet *vs.* Boggs, decided by the United States circuit court, sitting in New Jersey, in the year 1830, Baldwin, justice, presiding, and reported in 1 Baldwin Reports. In both these cases the court decides that the title of New Jersey, under the royal grant of Charles II., extends only to the Delaware river, and does not include any part of it. In 1721 New Jersey and Pennsylvania applied to the privy council, in England, to decide their respective titles to the Delaware river, bordering on their territories. Pennsylvania exhibited her charter, from which it appeared that she also was bounded on the east by the river. The
v council, which had the exclusive jurisdiction over colonial
ies, referred the question to York and Raymond, the at-
general and solicitor general of England. These crown
s heard counsel, to enable them to decide it; and they gave

the opinion that neither Pennsylvania nor New Jersey had, by virtue of their charters, any title whatever to the river. The claim of William Penn, arising out of his deed from the duke of York, of the 24th of August, 1682, was not before the crown lawyers, nor was his deed given in evidence, as appears by the opinion of York and Raymond, as published in 1 Chalmers's Opinion, which Mr. C. read. He then adverted to the fact, that not a single decision of any judge in New Jersey had ever been produced to show that she ever claimed title to, or jurisdiction in the river, its soil, or islands, within the twelve miles circle. No witness in this cause had said that she ever exercised any such jurisdiction, or set up any such claim before this controversy; and he quoted the evidence of thirteen different witnesses, many of them eminent lawyers and judges of Delaware, all testifying positively to the exclusive jurisdiction of Delaware, and stating many instances in which her jurisdiction had been exercised up to low water mark on the New Jersey shore. Vessels and persons, it appeared, had been often seized by process from Delaware while on the eastern side of the main channel. The settled idea appeared always to have been, that her title extended over the whole river and its islands, within the twelve miles circle.

Mr. C. then cited, and dwelt at great length upon the case of Headley's lessee *vs.* Anthony, et al., 5 Wheaton Rep., 374. This was a decision of the Supreme Court of the United States, pronounced by Marshall, Chief Justice. The principle decided by the court in this case is, that "when a river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its own dominion, and the newly created State extends to the river only, and the low water mark is its boundary." Mr. C. applied the decision to the case before him at length. The title to the whole country, including New Jersey and Delaware, was originally in the king. He first granted New Jersey, by the charter of 1664, and made the river her boundary. The Supreme Court of the United States had in effect decided that the king retained the river, and that the boundary of the newly created State or colony of New Jersey extended to the river only, and the low water mark was its boundary. He then cited several authorities to show that the king's grant carries nothing by implication, because the king is a trustee for the public; and the principle regulating the construction of private grants is not applicable to public grants, which are always construed strictly against the grantees. Davies' Rep., 154, 157; 7 Connect. Rep., 200; Chitty's Prerog., 392; Plowden, 333, 336. He also referred to Hale's treatise, *De Jure Maris*, in Hargrave's Law Tracts. The royal grant expressly gives the Hudson river. *Expressio unius est exclusio alterius.* Had it been intended to convey the Delaware river it would have been mentioned in the patent, as was the river Hudson. The grant in the confirmatory charter to Penn and others, west

Jersey proprietors, of the use of all "waters leading to or lying in the granted premises, for the purposes of navigation, fishing, or otherwise," was a grant not intended to extend the limits of the charter, as Judge Washington has decided, and was only a grant of the *use* of these waters for public, and not for private purposes.

If this view of her western limits be correct, said Mr. C., it is clear that the proprietary claim of New Jersey to this island in the river is without foundation. But admit, said he, for the sake of argument, that her charter had extended over the whole river, still the proprietary grant of 1784 was utterly void, because the grant could not operate over the bed or shores of the river, or any land where the tide ebbed and flowed, inasmuch as all such subaqueous soil was a part of the *jura regalia*, which belonged to the crown, or provincial government of New Jersey, from 1702 to 1776, and after the Declaration of Independence to the State alone in her sovereign capacity.

In the year 1702 the proprietors of New Jersey, by deed, surrendered all the royalties and powers of government which they had derived from the charters of Charles II. to Queen Anne, who accepted the surrender; and from that time the proprietaries ceased to govern the territory of New Jersey, reserving to themselves only what Lord Hale and other writers denominate the *jus privatum*, nothing more than the private right to the soil. From 1702 to 1776 New Jersey was governed, not by the proprietors, but by governors appointed by the crown, who, with the provincial legislature, constituted the royal government of that colony. During that period the beds of all the navigable rivers within her charter, being part of the *regalia*, were out of the reach and beyond the control of the mere proprietors of the soil. The royal government alone could grant them away; and even the crown itself, or the royal government acting by its authority, could not, in contravention of the principles established by magna charta, destroy or impair the public right, secured to all Englishmen, to the navigation and piscary of these rivers, and especially secured by these charters to the colonists. The Declaration of Independence transferred all the regalia and powers of government to the State of New Jersey, in her sovereign capacity; but the proprietors, after the surrender in 1702, held neither the *jus regium* nor the *jus publicum;* and the beds and shores of navigable rivers below high water mark were entirely out of their control. Any grant by them of such subaqueous soil was utterly and absolutely void. It is too late to deny this law, for the Supreme Court of the United States, in the case of Waddell *vs.* Martin *et. al.*, reported in 16 Peters' Reports, have solemnly decided the whole question. They held a proprietary grant for subaqueous soil in the waters of the Raritan bay and river to be utterly and absolutely void, and sustained the holding of the defendant in that case, who claimed the submerged soil under a grant from the State legislature, on the ground that the regalia were in the State, and not in the proprietors. The proprietors of New Jersey have ever held the *jus privatum*, or right of private property, in the vacant lands of New Jersey.

They hold it still; and they hold it under the royal charters, and by the boundaries of those charters. It is otherwise in Delaware and in Pennsylvania. There the right to all vacant lands is in the States respectively. In Delaware, after the revolution broke out, the State shut up the land office, and refused to permit, under a heavy penalty, any more proprietary warrants to be issued for vacant land, until 1793, when she opened the land office, and appropriated the vacant lands within her limits to her own benefit. By this act, and the act of 1794, while all former proprietary titles were carefully protected, the proprietaries themselves were denied the right to issue any more grants for vacant lands in Delaware. This produced a struggle with the proprietaries, of which it is sufficient to say that the State successfully resisted all their claims; and she has ever since retained the right to the vacant lands within her limits, as well as all the regalia which she acquired by the Declaration of Independence.

Mr. C. commented at length on the case of Waddell *vs.* Martin *et al.* He also cited many law authorities to show that a shoal in a navigable river, submerged at ordinary high water, could be granted only by a *State* in its sovereign capacity, by the exercise of its legislative power. He cited 10 Price's Excheq. Rep., 350, 378, 372, 369, 401; 6 Johnson's Rep., 133, Palmer *vs.* Hicks; 19 Johnson's Rep., 175; 1 Domat, lib. 8, sec. 1, art. 1; 10 Peters, 662, 724, 729, New Orleans *vs.* U. S.; 8 Greenleaf, 90; 17 Wendell, 571; 11 Ohio Rep., 142; 3 Kent's Comm., 427; 6 Mass., 435; 1 Woodbury and Minot, 403–'9, 421–'2, 427; 3 Howard; 3 Wheaton.

The case of Waddell *vs.* Martin *et al.* is a decision on this identical character of Charles II. It is not merely a parallel case. The Supreme Court of the United States have positively determined that the *proprietors* of New Jersey cannot grant away submarine soil; and, consequently, a grant by them of a shoal in the Delaware, called the Pea Patch island, which was submerged in 1784, and continued to be submerged at every high tide until 1814, could not be the subject of a New Jersey *proprietary* grant, even admitting that the charter of Charles II. of the 12th of March, 1664, instead of extending to the river, as it really did, had extended *across* the river to the right bank of the Delaware. So much, then, for the proprietary title.

Next, let us look at the title granted to the individual demandant of this island by the *State* of New Jersey. I admit that the legislature, in 1831, by an act, reciting that *doubts and difficulties existed as to the proprietary title* of Dr. Gale, who then held, as Mr. Humphreys now holds, attempted to cure the defect, and ceded to Dr. Gale all the State's right, title, and jurisdiction in this island. If the limits of the State extended no further than low water mark, on the left bank of the river, as I have shown, then this act was a mere *brutum fulmen*, no more operative than a similar act of the same authority to cede away the city of Philadelphia. But allowing, for the sake of argument merely, that the charter of Charles II., and the deed of the duke of York to Berkley and Carteret, under which New Jersey derives her title, extended over the whole

river Delaware, still I say, that even then her act of 1831 was but a dead letter. In her sovereign capacity she had no title to the vacant *lands* within her limits. That title was in the proprietors only. They held, and since her first settlement ever have held, the *jus privatum* in her vacant soil—the right of private property, subject, as all such rights are, to certain public rights and the regalia of the crown, or of the sovereign State. Therefore, when this island was reclaimed by the United States in 1814–'15, and rose above the tides of the Delaware, it was no longer a part of the regalia, or necessary for navigation or fishing. It became the proper subject of appropriation to private uses; and, as it was vacant land, at that time none but the *proprietors* could make a title to it. In every view of the case, therefore, the act of the State legislature gave no title. The case of Waddell against Martin and others, in 16 Peters, fully sustains this view, as do the other authorities on this subject to which I have referred. My conclusion, therefore, is, that the New Jersey title is not in the demandant. Whatever the title may be, it is still in the proprietors. I further infer that, if he even held their title it would not avail him.

Mr. C. then entered upon an extended argument to show what were the regalia granted by the crown in the letters patent of Charles II., of the 12th March, 1664. He held that the colonists, under that and all similar charters, were entitled to the rights of navigation, of fishing for shell fish, and floating fish, and also to the rights of self-defence. The proprietaries, before the surrender of the regalia, held these rights as trustees for the public, and he held them to be inalienable. After the surrender in 1702, the crown of Great Britain (and the provincial government of New Jersey afterwards) held them in trust for the same uses, and without the power of selling or ceding them away to private individuals, until the 4th of July, 1776, when the State of New Jersey assumed all the prerogatives and royalties of the crown as a sovereign State, and, in the exercise of her sovereign power as such, distributed such of them of them as she thought proper among the different branches of her government, by her written constitution, subject always to the power which she, with her sister States, has ceded to the general government by the constitution of the United States.

Mr. C. reverted to the subject of the boundaries of New Jersey on the river Delaware, and said that old colonial records, both of of New York and Delaware, furnished plenary evidence that the duke, after his grant of New Jersey to Berkley and Carteret in 1664, continued to exercise jurisdiction over the whole of the bay and river Delaware, and the whole territory of Delaware. He referred to several passages in Hazzard's Pennsylvania Register, copied from documents in the possession of the Historical Society, and to exemplified records from Delaware, to show that Sir Edward Andross, the royal governor under the duke of York, granted islands in the river, and appointed collectors for the bay and river, as well as other officers, and finally substituted Governor Nichols commander and governor in his stead, on his return to England. This exercise of power on the part of the duke over the bay and

river, after his own grant to Berkley and Carteret, Mr. C. urged, was inconsistent with the supposition that he had intended to grant that bay and river to Berkley and Carteret. It was good cotemporaneous exposition of the grant of New Jersey, and helped to show that Berkley and Carteret, under whom the New Jersey title is claimed, had *nothing in the river*.

Second. Mr. C. next proceeded to the consideration of the Delaware title to the Pea Patch island, which was ceded to the United States by the act of the legislature of the State of Delaware of the 13th of May, 1813.

We have (said he) incepted the Delaware title by letters patent or royal charter from the king of England, Charles II. to his brother, James, duke of York and Albany, &c., dated 22d March, 1683. As the existence of this title paper has been hitherto denied, we have taken pains to produce one fully exemplied copy of it from the Chappell Rolls of chancery in England, inspected in the reign of the present queen, Victoria, and three old exemplified copies, one of which belongs to the public records of the State of Delaware. We have shown another printed copy of the same letters patent among the proceedings of the provincial legislature of Pennsylvania; and we have shown *the original letters patent*, and have proved that they were found by Mr. Coates, who was formerly agent of the Penns in this country, while on a visit to Stoke Pogis, the family residence of the Penns in England, in the charter-room there, together with the original charter of Pennsylvania and the original deeds of feoffment from the duke of York to William Penn, dated 24th of August, 1682. These deeds from the king to the duke, and from the duke to Penn, are grants for the three lower counties on Delaware, now composing the State of Delaware. We have proved that Mr. Penn (heir and descendant of the original proprietary) gave these title papers to Mr. Coates, to be brought by him to this country, about ten years ago, for the use of his countrymen. Pennsylvania has thus obtained possession of her charter, which is now at Harrisburg; while the charter of Delaware, with the deeds of the duke of York, remains in the custody of Mr. Morris, the son-in-law of Mr. Coates. To Mr. Smith, a member of the historical society, we are indebted for the discovery of these papers; and to Mr. Penrose, formerly Solicitor of the Treasury, we are indebted for the copy from England. It was owing only to the kindness of those who had the custody of these important original deeds that we were enabled to produce them on this occasion, when the jurisdiction of the State over fifty square miles of the great river on her border is called in question. We have also shown that this charter from the king to the duke—the existence of which has been often denied, both in this country and in England—was given in evidence as one of the exhibits of William Penn in his chancery suit against Lord Baltimore, in 1750. Lord Hardwicke, in 1 Veazey, sen'r, 450, speaks of this exhibit, and its legal effect; and we have the original paper book, or breviat, signed by Mr. Penn's solicitors in that case, one of whom was Mr. Murray, afterwards Lord Mansfield. We were furnished

with this book for this occasion by the kindness of Mr. Thomas Gilpin. This breviat states the contents of the royal charter from the king to the duke, and adds the important fact that Penn, instead of the duke, had kept the possession of it.

With all this evidence before us, we may safely ground ourselves on this patent as the inception of our title. Our opponents could not prove the royal charter for New Jersey by anything but a printed copy in Leaming and Spicer's edition of the laws of that State; and they have had to resort to that same authority for every other public deed they have produced. We have also produced in evidence the original lease, dated 21st August, 1682, for ten thousand years, from the duke of York to William Penn, for the lands in Delaware, within the twelve miles circle around Newcastle, and also for the river Delaware, and the soil of the said river, and all the islands in the said river, lying north of the southernmost part of the said circle. This was found among the archives of the State of Delaware, with two exemplified copies of the deed of feoffment of the duke of York to William Penn for the same lands, river, islands, &c., lying north of the southernmost part of said circle. This deed was also exhibited in the case of Penn *vs.* Baltimore. My colleague has called your attention to the fact that there is but a single difference between the description in the king's deed and that of the duke's. The king's deed grants all the town of Newcastle, and fort therein, called Delaware, "*lying between New Jersey and Maryland.*" The deeds from the duke omit the words, "lying between New Jersey and Maryland." In other respects, the duke's description of the lands and waters lying within the circle is identical with the king's.

The king's deed conveys to the duke, his heirs and assigns, all the regalia and powers of government, in the very same words by which he conveys them in the New Jersey patent of the 12th of March, 1664. The duke's deeds to William Penn convey all these regalia and powers of government to him, his heirs and assigns. The second deed of feoffment, executed by the duke of York the 24th of August, 1682, conveys to William Penn, his heirs and assigns, all that part of the present State of Delaware lying south of the circle, reserving half of the quit-rents to the duke. The powers of government are conveyed to Penn by both deeds.

Mr. C. then proceeded to ascertain the construction of these deeds. In the progress of his argument, he held that the king's deed to the duke conveyed, first, the town of Newcastle and the fort therein, and the lands lying in the segment of a circle on the right bank of the Delaware, the centre of which was in the town of Newcastle, (said to be at a certain spot on the horse-dyke near the northern border of the present town,) and the radius of which circle was twelve miles; for which he cited Lord Hardwicke's opinion in 1 Veazey, sen'r, Penn *vs.* Baltimore, "that the circle was one of twelve miles radius." Secondly, he held that the deed conveyed all the islands in the river, and the river itself, with its subaqueous soil, lying north of the southernmost part of the circle, and not merely that part within the circle itself, but all the river,

at least as far as the northernmost boundary of Pennsylvania. He quoted from cotemporaneous historians to show that the object of Penn, in obtaining the grant of the lower counties, and especially of the lands within the twelve miles circle, and the river and soil of Delaware, was to command the *door* and *entrance* to his favorite colony of Pennsylvania, including the intended city of Philadelphia. His object was to protect that colony from the exactions on its commerce to which it might be liable, in case the country on the right bank of the river, below Pennsylvania, and the river itself, should fall into unfriendly hands. He quoted from the history by Ebeling, of Hamburg, translated by Duponceau, to show that the "*safety and security*" of Pennsylvania was considered by Penn a great object in obtaining the grant of the three lower counties on the river, as well as the revenue to be acquired from "*the hardy and laborious population*," composed chiefly of Swedes and Dutch, then residing on the right bank of the bay and river. He argued that Penn's object was not only the security of the navigation and commerce of the river, as necessary to the prosperity of his colony, but also the safety and defence of that colony against an invading foe. The power of establishing martial law for the suppression of insurrection, mutiny, and rebellion, and the power of repulsing and expelling all invaders, were expressly conferred upon him by the deed, as explained by the subsequent deed from the king. Without the river, he could not erect a fort on an island within it, nor plant a chevaux-de-frise, to repel a hostile fleet; for, in his prior grant of the colony of Pennsylvania, of 1680, his whole colony was bounded on the east by the low water mark on the western side of the Delaware river. Lord Baltimore's was a colony of Catholics; Penn's was a colony of Protestants, Dissenters, and Quakers. Penn resisted steadily every effort of Lord Baltimore to extend the Catholic colony across the peninsula to the river; and he obtained and sustained his grant of the three lower counties, in spite of the opposition of some of the most powerful nobles at the English court.

We have given in evidence the authenticated record of the livery of seizin when William Penn entered into the possession of the three lower counties under his deeds of cession from the duke of York. The power of attorney to deliver the possession is to be found in the deeds of feoffment. John Moll, the attorney in fact of the duke of York, delivered to William Penn, in October, 1682, turf, twig, and fowl, soil of the river and a porringer of river water; he delivered the key of Fort Casimer, with which, the record says, Penn unlocked the door of the fort, went in and locked himself in, and then came out and locked himself out. The learned counsel on the other side object to this mode of conveying the river. Yet the books already cited show that a feoffment is good for lands covered with water, and that the livery was properly executed for a navigable river. But suppose the deed of feoffment were utterly void, for or on account of a defective livery, the learned gentlemen have not attempted to invalidate the lease for the same premises under which Penn, on the

21st of August, 1682, became the tenant of the duke for ten thousand years. But to obviate all objections of this character to the mere formality of the deeds of feoffment, we have the letter from Sir Edward Andross, the lieutenant governor and deputy of the duke, addressed to the magistates at Newcastle, and also to those of St. Jones and Hoarkills, dated in November, 1682, expressly confirming the authority of Penn, reciting the deed of feoffment of the duke to him, and exhorting all the magistrates and people of the colonies to submit to his authority. This paper, which comes from the most ancient records of Delaware, with the seal of the royal governor of New York appended, in all things confirmed the title of Penn under the duke, so far as the duke could confirm it. It thanks the magistrates for their former good conduct under the government of the duke, relinquishes all future pretensions, and exhorts them and others to submit to and yield obedience to the government of William Penn, as the grantee of all the title of the duke. And just so far as Sir Edward Andross had power, as a royal governor, to make royal confirmation of Penn's title, it gave that confirmation. Probably, said Mr. C., the reason why the deeds of feoffment were executed may have been, that there was no act of parliament to authorize the recording in England of a lease for years by bargain and sale; and the feoffment was probably preferred as a better mode of conveyance, in the judgment of the council and conveyancers who prepared the deeds.

It is true, said Mr. C., that the State of Pennsylvania, in 1785, had seen fit to enter into a compact with the State of New Jersey, by which each of those States took the islands in the Delaware lying nearest to its own shore, *above the circular boundary* between Pennsylvania and Delaware, and by which it was agreed that each should exercise concurrent jurisdiction over the river above that boundary. If the Pennsylvania title to the river opposite to her territory was, by the operation of the deeds of August, 1682, identical with the title of Delaware within the circle, then the title and jurisdiction of New Jersey over the river above the circle were derived from the same source, to wit, the deeds of 1682. New Jersey can show no other title. How, then, can the gentlemen on the other side insist upon the evidences to be found upon her statute book that she has exercised jurisdiction over the river above the circle, as evidence tending to overthrow or contravene the Delaware title? The many acts on the statute book of New Jersey regulating the fisheries above the circle, are not inconsistent with the claim of Delaware to exclusive jurisdiction within the circle, but confirm and strengthen the position now taken in behalf of the Delaware title under the deeds of the duke of York, which are the only legitimate source to which New Jersey can refer to sustain her own claim under the compact with Pennsylvania. If Pennsylvania had no title to the river, except that derived from the deed of 1682, how can New Jersey claim title through the compact with Pennsylvania, except from the source of the Pennsylvania title?

With the policy of Pennsylvania in making this compact, by which she surrendered one-half the river above the circle to New Jersey, I have nothing to do. I think it is quite clear, from the evidence before us, that there was some mistake about the Pennsylvania title to the river in 1785. The opinion of York and Raymond, in 1721, that neither Pennsylvania nor New Jersey had title to the river and its soil, by virtue of *their* respective charters, was doubtless well known to those who negotiated for the cession of the Pennsylvania title. It may possibly have escaped observation, at the time, that this opinion must have been entirely changed by the production of the deeds under which Penn acquired his title to the three lower counties, and all the river and soil thereof north of the southernmost part of the circle. Had Penn's deeds for the river been laid before York and Raymond when they gave this opinion, it is quite certain, I think, that they never would have decided as they did, that the title to the river and its bed was in the crown. In giving this opinion, they expressly say, that no other charters were before them but those of Pennsylvania and New Jersey. Indeed, from other evidence, it appears probable, that at that day the deed from the king to the duke of York for the three lower counties had been mislaid.—See opinions of Northey and Thompson, in 1717 —Chalmers' Opinions.

In the progress of this cause, our learned opponents, (Judge Bibb and General Eaton,) who have exhibited great zeal in behalf of their client, have called in question the opinion of Lord Hardwicke on the trial of the case of Penn against Lord Baltimore, 1 Veazey, sen'r., 450. In that case the lord high chancellor adverted to the fact that the deed from the king of England to the duke of York was dated nearly seven months after the date of the deeds of feoffment from the latter to William Penn. Yet he held that fact as not invalidating Penn's title. He intimated that the title might be good by way of estoppel, for the duke was "in a condition to be estopped," meaning that he was then a subject, not the king of England. Whether his subsequent ascension to the throne defeated the estoppel, was he said, "a nice consideration." But he was clear, that, although the duke had no title when he made his deed to Penn, *with covenant for further assurance within seven years in the deed*, his subsequent acquisition of title from the crown, by the letters patent of the 22d of March, 1683, constituted him in chancery a trustee of the premises granted for the benefit of Penn; and he clearly intimated his opinion that the duke continued to be a trustee for Penn, although he afterwards became king. The chancellor says he was "a trustee, and why not a royal trustee?" To both his positions our learned opponents have taken exception. Both the grounds taken by Lord Hardwicke have been sustained with so much learning and ability by my colleague (J. A. Bayard) in the opening of the argument, that now, in closing it, I do not feel myself called upon to do any thing more than answer so much as the counsel on the other side have said in reply to him. On the estoppel, they have quoted many authorities to show that the king cannot be estopped. My colleague's argument anticipated this ob-

jection, and answered it by commentaries on the very authorities now cited to sustain it. One answer to their argument is sufficient. The duke was, on the 22d of March, 1683, as Lord Hardwicke says, in a condition to be estopped. Our opponents have cited many authorities in the progress of the trial, (in another branch of the case,) to show that the King cannot be a disseizor—that the king cannot do wrong, and that the courts will never construe his acts to effect a wrong. The duke being estopped as a subject of the crown, and Penn being thus seized, under his deeds of feoffment with covenant for assurance, and the letters patent from the King, by virtue of the estoppel, Penn could not be disseized by the Duke's ascent to the throne. On the second ground taken by Lord Hardwicke, that the duke was a trustee, and when the king became a royal trustee, for Penn, the matter was considered so clear by our learned opponents that they have not attempted to make an answer to it; their only reply on that subject being that Lord Baltimore's patent extended to the river, and that Penn could have no title to the river and its soil, because he had no title to the territory on its border—a reply which is irrelevant to the immediate matter we are discussing, and which I shall presently answer.

If Lord Harwicke was right, then Penn held the equitable title, and the arbitrator is, by the terms of the submission, to decide the question "by the rules of law *and equity*." Penn, then, held the beneficial interest (at least) in all the premises granted by the deeds of 1682; and the evidence before us shows that he and his heirs continued to hold it as proprietaries and governors of Delaware, called the three lower counties, from 1682, when the livery of seizin was executed to him under the feoffments, until 1776, when these counties met their sister colonies in this consecrated hall, and by their delegates, McKean, Rodney, and Read, joined in the declaration which made them all independent. But, during this long interval of time, from 1682 to 1776, the Penn title was often the subject of controversy. Penn was the intimate friend of James, duke of York. He was in great favor at court till the English revolution in 1688; when his friend, then James II., was driven from the throne, and was succeeded by William & Mary. He was then excepted out of the act of grace, being suspected to be a jacobite; and in 1692 his government over his colonies in America was taken away from him, and Benjamin Fletcher was appointed royal governor in his stead. Penn being recalled, solicited a restoration to his government. Fletcher gave dissatisfaction to the colonists; and Penn recovered the royal favor, and was restored to his government in 1694, by letters from Queen Mary, which Mr. C. then proceeded to read out of Hazzard's Pennsylvania Register. These letters restore him to the government both of the colony *and the territories*, composed of the three lower counties, with the same powers which he held under the letters patent from the king. It was a restoration in all things. The queen's letter to him says, "I appoint you governor, &c., over our colony, &c., of Pennsylvania, with the county of New Castle and the territories, with the appurtenances, &c., OF WHICH YOU ARE THE PROPRIETOR." This

letter from Qeen Mary is the strongest possible recognition and confirmation of the Penn title, as it expressly declares him to be the proprietor, that is, the owner, absolute and unqualified, of the private right of property in the soil. Penn remained in England until about 1699, and then returned to the government of his colony, of which Delaware was then a part. A full history of the dissention between the three lower counties and the colony of Pennsylvania has been laid before the arbitrator. At the earliest period of their history, they had been known as "the Hoarkills, otherwise called Deal, (now Sussex,) St. James, (now Kent,) and Newcastle." In 1700, they were known by the names of the three lower counties of Newcastle, Kent, and Sussex on Delaware, and by that name, after 1701, they constituted a separate and distinct colony of Great Britain, governed by their own laws, but having the same proprietary and governor with the colony of Pennsylvania. It is true that Judge Baldwin, on the trial of this question in New Jersey, says they were a part of Pennsylvania till the year 1776; but this only proves that the judge, who resided in Pennsylvania, was ignorant of an important fact in the history of his own State. The lower counties, as appeared by the notes and proceedings of the provincial assembly of Pennsylvania, and by the appendix to Booth's edition of the laws of Delaware, separated from Pennsylvania at the commencement of the eighteenth century, Penn agreeing that they should have the full benefit of his charter of privileges. They carried home with them all the rights and liberties secured by that charter. They acknowledged the Penns as their proprietaries and governors; and on the 2d of September, 1775, they established the boundaries between the three counties by an act which, in its preamble, recites and affirms the whole Penn title.

The commencement of the eighteenth century was distinguished among the colonists by the surrender to the crown of the royal powers of government in New Jersey, and by the separation of Delaware from Pennsylvania. At that day the country was greatly excited, by contests about the royal powers of government in all the colonies, but especially in those of New England. New Jersey surrendered those powers of government in 1702, as I have stated, and continued under a crown government from that day until the revolution. The ministry of England, excited by the colonial contests of that day, procured the passage of the statute 1st Anne, which prohibited the crown from granting charters with royal powers within the kingdom. After that day no charter with such royal powers appears to have been granted among the colonies; but Penn's continued to be a proprietary and charter government, with royal and sovereign powers, subordinate to the crown, and in many respects resembling the government of a county palatine in England. My colleague has shown how, in the year 1717, a powerful nobleman at the English court, the earl of S., then in high favor at court, petitioned the king, without success, for a grant of Penn's three lower counties—how the privy council referred the matter to the crown lawyers to decide, and they reported that no grant to the earl should be made until the king's title should be first estab-

lished in chancery. That put an end to the matter. No proceedings in chancery were ever adopted to establish the king's title, for the reason, as we have a right to infer, that no such title could be sustained. Yet at that time Mr. Penn was under a lunacy, the patent from the king to the duke was mislaid, and the attorney and solicitor general gave their opinion, with no other title papers before them than the deeds from the duke to Penn.

The crown clearly abandoned its claim. This would be a sufficient answer to any inference of title in the crown arising out of an order in council of 1685. That order is before the arbitrator. At that time Lord Baltimore contested Penn's title before the privy council. He claimed that his own patent from Charles II. for wild and uncultivated land, extended to the Delaware river. The privy council decided against his title on the ground that the territory in dispute was not wild and uncultivated land, being settled by a christian people, to wit: the Swedes and the Dutch, who, as it appears by authentic evidence in this cause, were settled on Lewistown creek, then called the Hoarkill or Hoernkill,* in 1629. We have given in evidence a record which shows that Egonques, and other Indian chiefs, made a grant to Mr. Godys of lands on the Delaware bay, on the first day of June, 1629; and Smith says the country was settled by the Swedes and Finns in 1627, while Governor Stuyvesant says it was first settled by the Dutch in 1625. The country was settled at least forty years before west Jersey. Lord Baltimore was, therefore, defeated in his application; and Mr. Penn, who appeared in behalf of his majesty, gained all the object he had in view in support of his own title, by showing that Lord Baltimore's patent had not taken the title out of the crown, and that as against him, Lord Baltimore, his majesty's claim to the territory was still perfect. Penn's title was not before the privy council. It was not necessary for him to show it. It was sufficient, for all his purposes, to show that the crown had never granted it to Lord Baltimore, who, having petitioned the king on that occasion for a hearing on his title, stood before the privy council like a demandant in a writ of right, or a plaintiff in ejectment, bound to show a title, and failed to do it. Penn, being heard before the council in behalf of the crown, like a respondent in a writ of right, or a defendant in an ejectment, folded his arms, and relied on the insufficiency of his opponent's title. The decree was in favor of his majesty's claim, and very properly so, because, as against Lord Baltimore, his majesty's claim was good. The king himself attended this hearing, and the order was signed by twenty-six privy councillors, the first noblemen in the kingdom, and the decree was made, under a catholic monarch, in favor of a quaker proprietary, against the application of one of the most powerful catholic nobles. At that time his majesty's claim, which was thus adjudged good against Lord Baltimore, was, as against Penn, good to this extent only; that is to say, he was royal trustee, by the judgment

* Called Hoernkill, or Hornkill, because it was crooked like a horn. Smith's History of New Jersey, 58.

of Lord Hardwicke, and held the legal estate to the three lower counties in trust for Penn, who held all the beneficial proprietary interest in those territories, except the right to one-half the quit-rents in all the country below the circle. William Penn died the 5th of July, 1718. In 1732 articles of agreement were entered into between the Penns and Lord Baltimore for a division of the peninsula between the Delaware and Chesapeake bays. The line was run, in pursuance of the articles, by commissioners appointed for the purpose; and that line has ever since remained the boundary between Maryland and Delaware. Before the settlement of the controversy, however, the Penns filed their bill in chancery before Lord Hardwicke for the specific performance of these articles of agreement. The chancellor decided in favor of the Penns, saving the rights of the crown. The decree may be seen, drawn out at length, in the last edition of Veazey, sen'r, vol. 1. The Penns could not have sustained their suit without an interest in the territory; and the decree of Lord Hardwicke, which saved the rights of the crown, gave liberty to either party to move to alter the decree, in case the crown should ever disturb the possession. No such motion was ever made that we have heard of, and we must infer that the crown never did disturb the title. Other articles of agreement were made on the 4th of July, 1760, between Frederick, Lord Baltimore, son and heir of the former Lord Baltimore, and the Penns, for the specific performance of which another decree was made by the chancellor in 1762, by which their boundaries were confirmed, as now run between Maryland and Delaware.. Finally, the Penns and Lord Baltimore petitioned his majesty, in 1767, to confirm their several holdings according to the line run between them, and to ratify "the several articles and enrolled decrees before mentioned," which he was graciously pleased to do by his order in council of the 11th of January, 1769; and thus the king finally confirmed the Penn title forever. All these proceedings are fully set out in the recitals of the act of the 2d of September, 1775, for fixing the divisional lines or boundaries between the counties in Delaware; for which see 1 Del. Laws, appendix, 567. Here the State, also, fully acknowledged the Penn title on the very eve of her declaration of independence. The legislature which passed the act of 2d September, 1775, appointed the delegates who attended in this hall, and declared her independence ten months thereafter. She thus came into the Union claiming the Penn boundaries; and the principle established by the Supreme Court of the United States is, that each State, on the declaration of independence, became invested with all the sovereign power within its ancient colonial limits.

In 1776 the State shut up the land office. When about to go into the fight, she said there should be no more vacant lands sold within her boundaries till she came out of it. She came out of the revolutionary struggle exhausted and bleeding. She was impoverished and overwhelmed with debt in paying troops for her protection at home against the British fleet, which was constantly annoying her in the bay, and in supporting her celebrated regiment, which poured

out its blood like water, in more than thirty battles, in other States of the confederacy. At that day she was in no condition or temper to submit any longer to the claims of a royal favorite or an English proprietary; and when she opened the land office again in 1793 and in 1794, she appropriated the vacant lands to her own use; but confirmed every title that the old proprietaries had ever issued. The Penns at first resisted her claim, but finally acquiesced in it. And now, after their acquiescence for fifty years in her title, under acts of limitation passed by her taking away all rights of entry after twenty years' adverse holding, it would be folly to consume your time in maintaining the evident position, which flows irresistibly from what I have stated, that her title to the vacant lands within her limits is good against the Penns, and consequently good against all the world. When she granted this island to the United States, on the 27th May, 1813, she had all the regalia of the sovereign, with the *jus privatum*, the private and proprietary title to the vacant soil included. The island was vacant land, and the title of the United States was therefore perfect.

I have consumed much time in attempting to maintain the Penn title, because I believe it to be the true title; and we are so instructed by the concurring testimony of all the professional men in Delaware, that the inception of title to land there is by a proprietary warrant and survey, whenever it is necessary to trace a Delaware title back to its origin. This, they tell us, is the general rule, to which there are a few exceptions—where the aborigines have granted title, before the extinguishment of the Indian right by others than the proprietaries themselves, was prohibited by law; and where titles from Lord Baltimore had been made before he was ousted by Penn. But I gave notice yesterday to my learned opponents that I should make the point, that, whether Penn had the title or not from the duke of York, the duke had the title from the king. So the title was out of the crown; and the boundaries in the king's patent, which are identical with those in the deeds of feoffment from the duke to Penn, are the proper boundaries of Delaware, even on the supposition that Penn had not the title. For, suppose the deeds from the duke to Penn to be utterly void, still the fact appears that the Penns held possession of the country, and governed it, for nearly one hundred years. They either held under their own title, or under that of the duke of York, or by his acquiescence; and they held by the metes and bounds in the king's deed, which have always been the metes and bounds of the colony and the State. In this aspect of the case the title is just as clear as if the Penn title were indisputable; and our opponents can gain nothing by all their elaborate argument against the Penn title, while they continue to admit, as they have been constantly compelled to admit, the title out of the crown, and resting in the duke of York and his heirs.

Mr. C. next reviewed at length the opinion of Judge Baldwin, delivered in the circuit court of the United States, in the case of Gale against Behlin and others, published in the printed documents of Congress. The judge was a man of great learning; but the

facts of the case were not properly before him. Suit had been brought in the circuit court for the third judicial circuit and district of New Jersey, against the laborers, workmen, and other servants of the United States on the Pea Patch island. It was tried before Judge Baldwin, in 1826. There was no other evidence before the court to sustain the Delaware title, except a printed copy of the two deeds of feoffment of the duke of York, made in 1682. No inquiry was made for the king's patent to the duke that we know of. No counsel acquainted with the Delaware title was employed in the cause. Not a single witness was examined to sustain that title by any portion of that abundant proof by which we are now overwhelmed—I mean the proof of the exercise of the exclusive jurisdiction by Delaware over the river within the circle. No distinction was made between the jurisdiction within and without the territorial claim of Delaware. Evidence was given, or the fact was assumed, that New Jersey had exercised jurisdiction in the bay below the circle, or in the river above the circle. All this was perfectly consistent with the Delaware title and the Delaware claim; and the learned judge had evidently taken no pains to make himself acquainted with the history of either New Jersey or Delaware, or even with the history of his own State, as is manifest from his stating that Delaware was a part of Pennsylvania more than seventy years after the former became an independent colony. He suffered himself to be deceived by the statement that King Charles II. had never made a deed for the three lower counties to the duke of York. Yet we have here the printed volume of the votes and proceedings of the provincial legislature of Pennsylvania herself, containing the whole deed printed at full length. He cites the opinion of Lord Hardwicke, in the case of Penn against Baltimore, and refers to the very volume and page where it is to be found; yet, if he had read it, he must have seen that the king's patent to the duke was exhibited in that very cause, and that the most important part of Lord Hardwicke's argument, sustaining the interest of Penn in the subject of the controversy, was predicated on that very deed. His argument, giving an erroneous construction and an improper effect to the habendum in the deed of the duke of York to Penn, was so entirely crushed by my colleague in the opening of this case, that our learned opponents here have not ventured to attempt to sustain the judge in this respect. Indeed, they have not ventured to rely upon his opinion; sensible of its defects, neither of them has laid the slightest stress upon it. That part of the learned judge's opinion, in which he ventures to construe one of the duke's deeds of feoffment by the language of the other, merely because they were both executed between the same parties and on the same day, though for different tracts of territory, is an example of judicial license for which our law books furnish no parallel. Our learned opponents have not ventured to defend it, or even to excuse it.

And what are we to say of the judge's knowledge of the geography of the river and the country around the island, the title to which was the subject of his decision? He admits that the Delaware title may cover the island, if a straight line drawn between

the points, where the circle cuts the right bank of the river, would pass eastward of the island, and that Penn's deed might cover so much of the river, its island and soil, as would be included within the segment of the circle westward of that chord. Absurd as is that construction of the deed of the duke of York to Penn, yet it is evident he did not know that it gave the island to Delaware; and he accordingly denied her that which his own construction would have given her. The line which he describes, as may be seen by the chart, passes far eastward of the island; and, if allowed as a boundary, would cut off a considerable part of Salem county, and include it within the limits of Delaware. All that he says upon the subject of prescription and adverse possession is palpably misapplied; for it is now evident that, with the single exception of the attempt of the claimants to establish a title to this island, there never was any possession adverse to that of Delaware on the river within the circle. Our learned opponents did not attempt to show any exercise of jurisdiction on the part of New Jersey, or any claim of ownership of any person under New Jersey, within those limits. It is true, that while Mr. Corkrin was under examination, he having proved that he lived fifteen years on the island, and that he had repeatedly voted in Delaware, having always paid taxes in Delaware as a citizen of the State, though he was a Pennsylvanian before he removed to the island, and that process from Delaware was often served upon persons on the island while he was there, our learned opponents ventured to put the question to him, whether no process from New Jersey had ever been served on the island. He replied, never; and that it never had been attempted but in one single instance. He said a fisherman had broken another's head in the river, between the island and the Jersey shore, and that a constable came from Jersey to the island to arrest him, who said he had process; though Mr. Corkrin says that he saw no process but a pistol. The fisherman denied the jurisdiction of New Jersey, and refused to go with the constable, who had to return with his pistol and his process without him; but the fisherman told him that if he would go to Delaware and get a regular process from one of her courts, *he would go with him!* The fisherman understood the common law of the country, and the people there understood no different rule. As to the possession, the long continued adverse possession upon which Judge Baldwin sustains the New Jersey pretension, there is not a scintilla of evidence in the whole case to sustain it, but this, namely, that Doctor Gale went on the island in the spring of 1813, about the 1st of May; built a fisherman's shantee of rough pine boards, about twelve by fifteen feet, on piles in the mud, covered, not with shingles, but with rough boards, which Judge Sinnickson, a highly respectable gentleman, called as a witness by the opposite party, declares could not have cost $100; that Doctor Gale fished there during the season, which we know terminated in about one month; that he caught few fish, I suppose not more than enough to pay him for the shantee; and that he then left the island, and his shantee disappeared; whether carried off by him or the tide does not appear. Whether this was such a *pedis possessio* as would

constitute an adverse holding against the State of Delaware, the arbitrator will judge. The State had no knowledge of it, and people who lived within sight of the island, on shore, swear they never saw it. It was an insignificant thing which, if noticed, would not have been resisted. It proved to have been an unprofitable speculation; and that is the sole reason why the fishermen from Newcastle never attempted any similar enterprise. You might as well go about to prove title to a whole forest, by showing that you had hunted the bear and the panther, or any other animals *feræ naturæ*, there, as to set up a title to an island under water at high tide, by proof that you had, at some time, fished for shad and herring on its margin. In this connexion, what becomes of all those lamentations and jeremiads so eloquently poured forth by my learned friends on the opposite side, about the tyranny of the government in sending an armed force to oppose Doctor Gale? The evidence is that no one ever disturbed him. He fished till he became tired of it, and went away; and a year after, when Captain Clark went down to take possession of the island for the government, he found it overflowed at every full tide, and nothing in possession of it but hundreds of thousands of crows. These had been the sole tenants of it since it first became habitable by them; and one of the witnesses tells us that the people from the adjacent shores, whose crops has been destroyed by these birds, made an unsuccessful attempt to drive them off; that they brought many muskets and small arms, and even cannon in their boats, with which they besieged them for ten days, and then were compelled to retire utterly discomfited. The crows retained possession of the island, in spite of them all. Neither cannon nor small arms could disposses them, until the United States, in 1814, sent Captain Clark, with one hundred soldiers and forty laborers, to occupy and embank the island. After a long contest, during which, as the captain says, the soldiers took advantage of the crows, when blinded by the mists and fogs of the river, or by some disease in their eyes, and sold the crow-scalps at Newcastle, where they were received in payment of the public taxes, the crows abandoned the island, and the flag of the United States waved in triumph over it.

[The ludicrous description of the siege of the crows produced great merriment in court.]

Does any one believe that Dr. Gale could have done such deeds in arms; that he, single-handed, and without troops or artillery, could have reclaimed or even recovered this island from the crows? The doctor's fishing for about three weeks on the island, in the year 1813, appears by the evidence to have been the only act of possession by him, or those under whom he claimed, from the beginning of the world down to the period when the government took possession of the island. I say nothing of the absurdity of attempting to prescribe for an island, or especially for a shoal beneath the flow of the tide. The proof of the case renders it unnecessary for me to discuss the law of prescription, or its application to such an object. In the brief furnished by Mr. Wall to the government, investigating this title, it is said that Stuypson's island

and Egg island were held under grants from New Jersey. If so, the fact was entirely irrelevant. The islands were in the bay near the Jersey shore, and outside of the circle. I know nothing of either, or of the grant for them. In Smith's History of New Jersey, p. 445, it is mentioned that the Indians claim title to "Stuyp-son's island, near Delaware river." If this be true, we may doubt the existence of any State grant for it. And here let me enter my protest against any attempts to establish a prescriptive right to either lands or waters within the limits of Delaware, by showing a trespass on what the law writers call "an unguarded possession," a trespass of which the State had no notice, or which was too insignificant to attract attention or resistance. If it could be proved that any citizen of New Jersey had built a temporary shantee on the little sand flat called Goose island, or even pastured a cow there, would it not be perfectly ridiculous to set up an adverse holding within the circle for the State of New Jersey, when the people on the opposite shore had either not noticed the fact, or, through charity for the poor man, had not driven him away?

The last point in the opinion of Judge Baldwin to which I shall advert, is that in which he decides against the title of Delaware, on the ground of the mere preamble in her land law of 1794. That act, by way of recital, claims title under the treaty of peace of 1783, by which the crown of Great Britain relinquished to all the States the lands within their limits. I shall not discuss the effect of that treaty, or of Mr. Jay's treaty of 1794, upon the property of non-resident British subjects. We know that many of the States, and even Pennsylvania herself, confiscated the estates of such as held property in this country, and at the commencement of the revolution, without any treasonable act, took up their residence in the mother country. Whether the Delaware land law of 1794, passed before the ratification of the treaty of Mr. Jay was exchanged, was or was not a violation of the spirit or letter of that treaty, might have been a very proper subject for consideration in former days, when the Penns asserted their title to the vacant lands in Delaware. I do not consider the act as an act of confiscation, and it is unnecessary to decide whether it was or was not. It was an assertion of a revolutionary right, but it imputes no act of treason. Whether the law was binding on the Penns or not, is no question now before the arbitrator. He knows, from the history before him, that the Penns have acquiesced in the Delaware claim for more than half a century, and that the holding of the State has been strictly adverse to the claim of the ancient proprietaries during all that period. With this the State of New Jersey has nothing to do. Admit, for argument sake, that the Penns have been wronged, and how can she hold under them? Has she the Penn title? Can she make profit to herself out of an injury done to the Penns? And what right has she to look into the domestic legislation of Delaware, applicable to lands and persons within the sovereignty of the latter, and turn that domestic legislation to her own advantage? Judge Baldwin considers the act of 1794 a repudiation of the right of the Penns—a disclaimer of the Penn title.

Yet it is apparent from the whole act that one of its great objects was, to confirm all the land titles in Delaware which had ever been lawfully issued, either by the Penns or the duke of York. The learned judge calls the *recital* in the preamble of this act of Delaware, her repudiation of the old proprietary title. What he means by repudiation, our law books do not advise us. If he means anything, it is that the State is estopped to assert the truth by a mere preamble in one of her legislative enactments. But no answer has been given to the argument of my colleague, that the State of New Jersey could not take advantage of such an estoppel, if there were any, because she is a stranger to the act; and there can be no legal estoppel which is not mutual and reciprocal. Besides this, the books referred to by our opponents show that the recital of a deed, or the preamble of a statute, cannot create an estoppel. Yet, without reference to any of these considerations, Judge Baldwin decided away our whole case, on the trial of Gale *vs.* Behlen, in New Jersey. He held that the effect of the Delaware law of 1794 was to give to the State of New Jersey, and the claimant under her title, a part of the territory of Delaware, which that claimant might thus recover as plaintiff in ejectment. The holding of the learned judge, therefore, amounted to this, that the State of Delaware, through her act of 1794, had, by way of estoppel, or, as he calls it, by "election and repudiation," ceded away a part of her territory to the State of New Jersey. If so, the State of New Jersey must have agreed to accept this portion of territory from Delaware, before she could become entitled to it. There must, therefore, have been some compact or agreement between the two States, the one to cede away a part of her territory, and the other to receive it as part of hers. To all this the reply has been already given, that the constitution of the United States expressly forbids two or more States to enter into any compact or agreement without the consent of Congress; and it is not pretended that any consent of Congress has ever been given. This article of the constitution, which was intended to protect the States of the Union from indiscreet concessions by one to the other, cannot be violated either directly or indirectly. That part of the learned judge's opinion in which he says that Delaware, on coming into the Union, had her "election" either to affirm or repudiate the proprietary title, is a new doctrine, never heard of before. Pray, sir, who had the right to put her upon her election? What principle, or what rule of duty, demanded such a thing of her? And if she elected, as he thinks she did, to prevent the Penns from selling any more lands within her boundaries, does that disprove the great fact which history records, and which she has repeatedly asserted on her own statute book, that she was one of the colonies of Penn, and held as such by the metes and bounds in his charter? If the legislature of Delaware had asserted, in a thousand preambles, that the Penns, in 1794, had no title to the vacant lands in Delaware, the whole of them would not have shaken the great fact established by all history, that William Penn was the owner of the vacant lands in the territories comprising the three lower counties.

There yet remains, said Mr. C., another view of this case; and, if I am right in it, the title of the United States is good, although the utmost pretensions of New Jersey and our learned opponents, which are that her title extends to the middle channel of the river, should be sustained. If she holds to the middle of the channel, as they maintain she does, where is that channel? The arbitrator, to give title to Mr. Humphreys, must decide this question against us, in case he thinks the New Jersey title extends to the middle of the river. If he thinks her territory stops at low water mark on the Jersey shore, there is an end of the matter; and it is not necessary for him to decide the question I am about to discuss. Many witnesses have been examined, and much evidence has been produced on both sides, to show where the main channel runs. Mr. Fairfax, of the coast survey, whose certificates, in answer to questions by me propounded to him, through Professor Bache, the superintendent of the survey, are, by consent on both sides, admitted as evidence, states that a line run midway between the shores of the river would intersect the island, leaving a part on the Delaware and a part on the Jersey side; that the northern part of the island is nearest the Delaware, and the southern part nearest the Jersey shore; that, of the two channels, into which the river divides itself just above the island, one passing on the Delaware the other on the Jersey side, the greatest depth of water is in the Jersey channel, being forty feet, while the greatest depth in the Delaware channel is but twenty-five feet; that the average depth of the Jersey channel is thirty-two feet, and the average depth of the Delaware channel is twenty-three feet. The Jersey channel is, therefore, nine feet deeper than the Delaware channel. Mr. Fairfax also proves that the Jersey channel is the widest and the shortest channel. The chart of the river, from the coast survey, is before you. Mr. Fairfax has not stated the width of the Jersey, as compared with the Delaware channel; but, from the survey, it is evident that the Jersey channel is twice as wide as the Delaware channel; and the inference must be that the volume of water which daily passes on the Jersey side of the island is vastly greater than that which daily passes on the Delaware side of the island. We have no legal definition of the "main channel" of a river, but I suppose that such a channel is that through which the greatest volume of the waters of the river is discharged, and that which is nearest to the middle of the river. The chart shows that the Jersey channel passes very near the centre of the river, and not far from the eastern bank of the island; while the Delaware channel passes at the distance of a mile from the island, close under the Delaware shore. The bottom of the Delaware channel is of soft mud; that of the Jersey channel, like the Jersey shore, is chiefly of sand. Mr. Fairfax says that a vessel drawing more than nineteen feet water cannot pass through either channel at low water. If it was not for a partial obstruction at the northern entrance of the Jersey channel, it is evident, from the chart, that a vessel drawing thirty feet of water might pass through that. In 1836 the Pennsylvania line-of-battle-ship, the largest vessel that ever floated on the waters of the Delaware,

passed down the Jersey, not the Delaware, channel. Mr. Corkrin, who lived on the island for fifteen years, and upon whom, as well for his character as from his superior opportunities of observation, I entirely rely, says that he has often seen large ships and brigs passing through the Jersey channel, and not unfrequently beating through it, while, it is admitted that, as the bottom of the Delaware channel is soft, and the channel itself better known, the greater number of small craft and common merchantmen usually prefer that, as an injury from grounding on mud bottom would be less than an injury from grounding on a bottom of sand or gravel. If, by the words "main channel," you mean that through which the greatest number of small vessels and common merchant ships have heretofore passed, the channel is on the Delaware side, where the Chesapeake and Delaware canal draws the small craft, and where vessels often stop to procure supplies at Delaware city. But if, by the main channel of the river, you mean that through which the greatest volume of water is discharged, that which is the deepest, and the widest, and the shortest, and that which is the nearest the centre of the river, that is the New Jersey channel. Such it is, manifestly, from the coast survey; and the coast surveyor, being interrogated, expressly says that the Jersey channel is the *main channel* of the Delaware river. It is true that two or three pilots, and several common watermen, who have never navigated anything but a small craft in their lives, have told us that they considered the Delaware the main channel, by which they have meant, generally, that it has been more navigated by vessels than the other. But they appeared to have been entirely ignorant of the depth of water in the eastern channel, and their testimony strongly reminds us of the refusal of some of the New York pilots to believe in the existence of Gedney's channel, long after the coast survey had published its soundings to the world. I am not aware that our Delaware pilots, although among the best in the world, were acquainted with the existence of Blake's channel, on the western side of the bay, before the coast survey disclosed its course and depth. Captain Skellinger, a pilot, acknowledged to be of the highest order of merit, has given the most ample testimony on this subject; and the arbitrator must have been struck, as I was, by his remark that the Pea Patch island was evidently a formation of mud from the Delaware shore, and not from the Jersey shore, which is chiefly composed of gravel and sand. It has been said that in ancient days the depth of water was much less than it is at present, and that the Delaware has been constantly gaining for a number of years upon the New Jersey bank. That does not alter the relative rights of the two States. In such a case, what is lost by one of two coterminous States is gained by the other; and if it had been proved that the main channel was formerly on the Delaware side, but that it had insensibly changed its course and passed through the Jersey channel while forming the island, the law of nations would, in that case, clearly give all the alluvia and all the islands westward of the new channel to the State lying on that side of it. Vattel, book 1, ch. 22, secs. 267, 268, 269, 270, 274, 275, and 276.

The distinction is between alluvion and avulsion. A State loses or gains by the former, but not by the latter. Hale, De Jure Maris, ch. 6.

In closing my remarks, said Mr. C., suffer me to say that a decision in this case against the title of the United States under the State of Delaware to this island, as it could not be made without deciding against the ancient jurisdiction of that State over fifty square miles of the river, would injuriously affect and seriously derange the views and interests not only of those concerned in the navigation of the river, but of the business community in general. It has been proved by the testimony, conclusively, that Delaware has exercised exclusive jurisdiction over the part of the river within the circle as far back as the memory of living man extends. As before said, no witness deposes to a single act of jurisdiction by New Jersey over this part of the river; nor does it appear that any lawyer or judge in that State would give testimony that she was entitled to or had exercised such jurisdiction. The venerable Kensy Johns, now near ninety years old, of Delaware, formerly chief justice of the supreme court, and afterwards chancellor of that State, who administered justice there in a judicial capacity for thirty-eight years, and who, as a professional man, practised in the courts of Delaware nearly seventy years ago, whose high character for learning and integrity must be well known to the arbitrator, swears that he never heard the exclusive jurisdiction of that State over the river within the circle questioned by any man, either in or out of court, until Dr. Gale set up a claim to this island. And he, and all the other professional gentlemen who have been examined, swear positively that the State of Delaware has exercised exclusive jurisdiction within the circle, and they have never heard her right to do so questioned, except in the single instance of these claimants under this Jersey title. Thirteen witnesses, sworn before the arbitrator, all depose to the same state of facts, many of them giving in evidence repeated acts of jurisdiction by Delaware up to low water mark on the Jersey shore, her officers seizing vessels and persons, debtors and offenders against the law, in all parts of the river within twelve miles of Newcastle, without question of the Delaware right. They prove that no governor or other officer in Delaware ever doubted the Delaware title. Is there any such proof that any governor or other officer in New Jersey, ever claimed the title to or jurisdiction over this part of the river? On the contrary, it is expressly proved that, in May, 1813, General Bloomfield, former governor and chancellor of New Jersey, waited on the Legislature of Delaware, then in session at Dover, and solicited the grant of this island to the goverment of the United States for the protection of New Jersey, as well as Pennsylvania and Delaware; that he consulted with the then attorney general of the State of Delaware, who was at the time a member of the legislature; that he did not doubt the Delaware title; and that he never intimated that there was any claim to the title in New Jersey. If he had imagined the title was in New Jersey, would not he have solicited a similar grant from the legislature of his own State? If she had

had any claim, would he have compromitted it by asking the grant from Delaware and not from her? Yet, sir, it was upon his application that the grant was made. Delaware has been charged with cupidity. Delaware did not receive a dollar; she never asked or received any compensation for this or any other of the numerous grants she has made to the United States on the bay or river. She holds herself as a high trustee for the navigation and defence of the river within her limits, subject to the rights of the general government, as freely conceded by her. She granted this island as she had granted the site for the Delaware breakwater; and she would scorn to take a dollar from the treasury of the nation for any territory of hers which was necessary either for the defence of our country or the protection of its commerce. If the decision shall be that New Jersey extends to the middle of the river, her jurisdiction must be commensurate with her title. The question then will arise, and become the subject of litigation in all future cases, where is that *filum aquæ*, or thread of the stream, which is to separate the jurisdiction of one State from that of the other? At present, there is no difficulty in arresting a debtor or criminal in this part of the river. Every body knows where to procure the writ for the purpose, and every public officer in Delaware knows how far he may pursue. But let this jurisdiction be disturbed by an adverse decision, let the *filum aquæ* be established as the boundary between the States, and a writ from New Jersey will not secure either an escaping criminal or a debtor. The vessel containing the delinquent may pass on the other side of the middle of the stream while a boat is approaching with the officers to arrest him. In every case where a man is arrested on this part of the river, the question will be made, was he on this or that side of the middle of the stream, and the evidence in this cause shows how uncertain will be the testimony of men on such a subject; for in this case the testimony is about equally divided on the question whether the Pea Patch is nearer to the Jersey or the Delaware shore. Decide this question against Delaware, and she may be in no temper to enter into any arrangement or compact, with or without the consent of Congress, providing for the concurrent jurisdiction of both States over the whole river. We have reason to think that Pennsylvania yielded concurrent jurisdiction over the river above the circle under a misapprehension as to her own rights. Delaware is not, and never has been, under any such misapprehension. In the year 1822, when New Jersey applied to her to appoint commissioners to make some agreement about the waters and sub-marine soil of the Delaware, she refused; and, so deep is her conviction of her own rights in this respect, that I have no reason to suppose she would ever consent to extend the jurisdiction of any other State within what she has believed to be her own limits by her own voluntary act. The *filum aquæ* would then remain the boundary; and the "door and entrance" to the commerce of the river, which has been hitherto protected by one exclusive jurisdiction, would be supplied by two doors or outlets, through one of which justice would be always evaded when an attempt should be made to en-

force it at the other. Whether the business men and merchants on the shores of the whole river, who have constantly availed themselves of this established jurisdiction to recover their debts, and even the citizens of New Jersey themselves, would not suffer by such a division of the jurisdiction, all men may judge. The circle extends, as appears by the draft of it made by the coast surveyor, to a point on the river a little below Marcus Hook on the north, and to a point between Port Penn and Liston's tree on the south. It embraces this island, the southern part of which, Mr. Fairfax says, is 4.98 miles from the spire at Newcastle, a point of the triangulation. The entrance to the Chesapeake and Delaware canal is within it; and the arbitrator will readily perceive the great extent of commercial interests which cannot fail to be affected by breaking up a jurisdiction which all understand, and to which all have hitherto submitted without a murmur.

Mr. C. then thanked Mr. Sergeant for the kind and patient hearing with which he had honored him, and resumed his seat.

Decision of the Hon. John Sergeant, arbitrator.

The question submitted by the United States on the one side, and James Humphrey on the other, is thus stated in the submission: "to decide the question of the title to the Pea Patch island, as derived by the United States from the State of Delaware, and by the said James Humphrey, claiming through the said Henry Gale, deceased, from the State of New Jersey."

The importance of the case consists chiefly in this; that it involves the question of the boundary for nearly twenty-five miles, between the two States just named. It is true that the settlement of that boundary is not submitted, nor to be decided in the arbitration, New Jersey and Delaware not being parties to the submission, nor having agreed so to submit their rights. But it is also true that, in conveying the one to the United States, and the other to an individual, the island in controversy, they have necessarily communicated to the grantees the right to assert the title respectively conveyed to them, and to dispute the adverse title; and it is very manifest that this controversy turns mainly, if not entirely, upon the question of the limits and jurisdiction of the respective States. If the Pea Patch island is within the State of New Jersey, the title is in Mr. Humphrey. If within the State of Delaware, the title is in the United States.

The consideration and respect due to these States, as members of the Union, in whatever may touch their rights and interests, seemed to require that as much publicity as possible should be given to the proceedings; and an intimation to that effect, was promptly acceded to by the city and county of Philadelphia, in liberally granting to the arbitration the use, first, of the supreme court chamber, and afterwards, of the venerable hall of independence. The arbitrator was attended by the counsel of the parties, who had laboriously searched out the evidence wherever it could be found, and followed its production with an able and learned, as well as interesting, discussion on both sides. It is believed that nothing has been omitted in either respect; and that there is no reason to suppose that anything in the shape of evidence or argument remains unexplored, which could throw additional light upon the subject. It remains for the arbitrator, after careful deliberation, and with the aids just mentioned, having come to a conclusion satisfactory to himself, to make his award. In ordinary cases his duty would be performed by simply executing the needful paper, and giving it the direction which is required, in order to render it, as demanded by the submission, "final and conclusive between the United States and the said James Humphrey, claiming under the said Henry Gale, deceased."

But the same motives of consideration and respect, already stated, for giving the utmost publicity to the proceedings; the nature of the controversy; the length of time it has been pending; the names

that have been connected with it, from whom he will feel himself bound to differ in his views, or at least to appear to differ; and, he must add, the great confidence reposed in him by the parties in leaving the matter so long litigated to his sole determination—a confidence which forbids him to doubt his ability to decide it, but by no means relieves him from an anxious sense of the responsibility of the task he has, by their invitation, undertaken—all these things concur to impose upon him the duty, as it is also his desire, to present, in an intelligible and somewhat permanent form, the grounds of his decision, for the satisfaction of the parties, and the examination of those who may feel any curiosity about the case, or any interest in it. He is fully aware that his opinion is of no authority whatever, except for the single purpose as to which the agreement of the parties has made it conclusive; that is, the question of title between them. He will, therefore, proceed to state these grounds as briefly as may be consistent with perspicuity.

The island in controversy, called the Pea Patch, lies in the river Delaware, rather less than five miles from Newcastle, in a southeastwardly direction. The most satisfactory evidence respecting it was given by Wilson M. C. Fairfax, esq., of the United States coast survey, being from actual and careful survey and measurement. It was in writing, and not under oath, but was received by consent of both parties; and there is no reason to doubt its accuracy. According to this witness, the length of the island is 1,083 yards, its average breadth 461 yards, and its area 87.60 acres. The mid-line of the island, at its north extremity, is 2,090 yards from the Delaware shore, and 2,130 from the Jersey shore—the mid-line of the southern extremity is 2,130 yards from the Delaware shore, and 1,875 yards from the Jersey shore. The middle line of the river Delaware, he says, run through the island would throw 21.9 acres on the Delaware side, and 65.7 acres to the New Jersey side. Such a line, he states, would pass through the island 46 yards northeast of the southwest extremity of the wharf at the lower end of the island which projects towards the Delaware shore, and 20 yards eastward of the middle point of the upper end of the island. With respect to the water, the witness says, the main and deepest channel of the Delaware river opposite the Pea Patch is on the Jersey side. The greatest depth of water in the channel on the Jersey side is 40 feet, and on the Delaware side 25 feet. The average depth of water in the channel of the Jersey side is 32 feet, and on the Delaware side 23 feet. But to take the entire channel on either side of the island, no vessel drawing more than nineteen feet water, at low water of spring tide, can pass through. The Jersey channel is the shortest and widest, and both about equally curved.

Witnesses have been produced to show which is the main channel of the river, as to which they have differed in opinion. The greater part, probably, have thought the western or Delaware channel to be the main channel. They have stated that the bottom on that side is softer and safer, as well as better holding ground, than on the east, though they state, also, that the eastern channel has undergone changes at different periods. Some of them have stated,

too, and no doubt truly, that the shore on the Jersey side, opposite the Pea Patch, has been wearing away considerably for some years past. And, finally, some of them, judging only from sight, have asserted the island to be nearer to New Jersey than to Delaware. As to this, however, the evidence from survey and measurement already referred to, is much more to be relied upon than opinions like these.

In the view to be taken of the case, and with reference to the grounds upon which it will be decided, it is not necessary to go into the particulars of the testimony just adverted to. The material facts, about which there can be no dispute, are these: The island is on the river Delaware, with a deep channel on each side; is far below the low-water mark on both sides; is not connected with the land either of New Jersey or Delaware; and is at all times of tide surrounded by water. There is a shoal, called the Bulkhead shoal, from the northern end, towards the northward and eastward, but it is never bare; and is, besides, pierced by a channel of such width and depth, that vessels of heavy draught of water can pass through it. The only question raised about it, and that not at all material, is, whether large-sized vessels can beat through it from the western channel to the eastern, or in the opposite direction, against a head wind. The fact is, that vessels can pass entirely round the island, upon the waters of the river, at all times of the tide. The island is in the waters of the Delaware.

It is proper further to state, that this island is of comparatively recent formation. Maps and charts, as late as the middle of the eighteenth century, do not mention it. Kensey Johns, esq , who was eighty-eight years and four months old at the time of his examination, (November 2, 1847,) a witness not more venerable for his years than for the high stations he had held, and the uniform excellence of his character and conduct through his long life, states that he had resided in Newcastle from the year 1780 till that day. He then says, "I do know it (the Pea Patch) and have known it since the year 1780. At first it appeared about the size of a man's hat. In 1813, when the United States took possession of it, it had grown to be a large island. It was not worth a cent to a private citizen; the expense of banking would have been more than it was worth." The general conclusion seemed to be on both sides that it had not made its appearance earlier than 1770, which, in the argument, seemed to be an agreed time of its beginning to be visible, and was probably nearly correct. It would seem, with some allowance for what must be measurably hypothetical, to have sprung up from the bottom, in the deep channel of the river, dividing that channel into the two channels, whose respective titles to the dignity of the "main channel," have been so much controverted in the evidence and the argument. From other evidence, it appears that, until the United States made some embankment, the island was nearly, if not entirely covered with water at every tide.

The main point, however, is that before mentioned, which will not be affected by any error in the conjecture just stated. From its first appearance, the island has always been where it now is,

that is to say, in the deep river, below the low water mark, surrounded by navigable water, and separated at all times from the land on both sides.

The description and account thus given of the subject of controversy, are deemed to be sufficient for the present, to introduce and render intelligible the several questions to be considered and decided. They are indisputable, it is believed, and stand as facts beyond the reach of the conflicts in the evidence as to other matters, not deemed to be important, and therefore laid aside.

We are thus brought, after stating what the thing in controversy is, enabling us to judge by what kind of title such a thing can be claimed and held, to the examination of the case made out by the respective parties. And it is proposed to begin with the case of Mr. Humphrey, as most conducive to the right understanding of the questions to be considered.

Has Mr. Humphrey made out a title?

He begins taking the evidence in chronological order, and not in the order in which it was introduced, with the copy of the record of two warrants from the proprietaries of west New Jersey, one dated November 4, 1743, for 600 acres of unappropriated land in west New Jersey, the other dated August 7, 1782, for 5,000 acres, a return of a survey under them for Edward and Clement Hall, October 8, 1784, "of an island in the river Delaware, called the Pea Patch, situate in the county of Salem; about one mile west from Finn's point, in Penn's neck, and is about west of the mouth of Salem creek, &c., containing 178 acres of marsh, sand bank, and mud flats. Newcastle distant about $4\frac{1}{2}$ miles." The record adds: "November 3, 1784, inspected and approved by the council of proprietors, and ordered to be recorded."

This record, authenticated as it was, was good evidence by the laws of New Jersey, and therefore was good evidence in this arbitration. It was accordingly admitted.

Many objections were made to the warrants, and especially to the survey, which need not be stated. The answer to them all was this, that if the proprietaries of west New Jersey were the owners of the island, and had power to grant it, it was for them, and for them only, where there was no interfering right, to object to irregularities in the warrants or in the surveys under them. By accepting and approving the return of survey, and ordering it to be recorded, they waived all such objections, and no one else could make them, unless he had a right which was interfered with. The survey must, therefore, be taken to be good, and to have vested the title in the Messrs. Hall, if the proprietaries had a right to grant. From Messrs. Hall, the title, by mesne conveyances, was regularly derived to Mr. Humphrey, so as to vest in him all the right they had, which, as we have seen, was all the proprietaries could give, neither more nor less.

The question then is, what right had the proprietaries? When Judge Baldwin gave his charge to the jury in the case of Gale's lessee *vs.* Beling, in the circuit court of the United States for the district of New Jersey, (which will be more particularly noticed

hereafter,) the case of Martin *vs.* Waddell (16 Pet. 367) had not been decided by the Supreme Court of the United States, where it was brought by writ of error to the circuit court just mentioned, upon a judgment there rendered, Judge Baldwin presiding. The decision of the Supreme Court was in 1842. Being upon a question within the jurisdiction of that high court, it is deemed to be of the highest authority in all inferior tribunals, and, of course, in this, in point of authority, the most humble of all. The point there decided, to say nothing of the learned and satisfactory reasoning of the chief justice (Taney) in delivering the opinion of the majority of the court, the very point decided is, that after the surrender to the crown in 1702, by the proprietors of east New Jersey, of the powers of government, they had no right in the navigable rivers within the charter limits of New Jersey, nor to the soil under them, and have had none since. In this respect, the west New Jersey proprietaries stand upon the same ground precisely. Both surrendered the powers of government at the same time, and, it is believed, in the same terms. The decision of the Supreme Court equally settles the law for both. It follows, that the west New Jersey proprietors, at the date of the warrants and survey, and acceptance of the survey, had no right in the river Delaware, even though it had been within the charter limits of New Jersey, (which will be hereafter examined,) and could give no right in the island to Messrs. Hall. For, upon the survey itself, it appeared that the island was "in the river Delaware," and that it was "about one mile" from Finn's point, the nearest land on the Jersey coast.

The same point was decided in the same way by the highest judicial tribunal of the State of New Jersey.—Munday *vs.* Arnold, 1 Halsted, 1.

Pennington, 391. The first of these cases is said to have been upon a location made to try the right. In the other it came up incidentally.

The concurring judgments of the Supreme Court of the United States, and of the judges of the highest court of New Jersey, in such a matter, certainly do amount to binding authority. In accepting them as such, however, it is not to be understood that any doubt is entertained of the solidity of the grounds upon which they were made. It may be deemed presumptuous, perhaps, even to suggest that they are approved, where approval is of so little consequence, indeed so entirely valueless, in comparison with the proper and intrinsic weight of the judgments of these high courts, and especially of the Supreme Court of the United States. It may be allowable, nevertheless, to add, in vindication only of the effort to fulfil the whole duty confided to the arbitrator, that if the question were new, and to be examined without the aid of the great light thrown upon it by the opinion of the Supreme Court of the United States, having fully and deliberately examined the question, he should, upon original grounds, come to the same conclusion that he most willingly yields to the rightful authority of the judgment. It seems contrary to reason, and against the spirit of our institutions, that great public rights, in which all have an interest and

concern in common, should be without a public guardianship, disinterested enough to regard all with impartiality, and powerful enough to protect them in the enjoyment of their privileges. Government is the proper trustee, everywhere existing with the consent or allowance of the people, and in our representative republics by free election, with the power of change. If, in the discharge of such trust, portions might be disposed of, so as to diminish the common fund, still there would be no contradiction, as is supposed of one or more of the grants by the State of New Jersey, for it must be presumed that such disposition is itself in some way for the common benefit, and on terms the least injurious to the public. A private proprietor, on the contrary, looks only, and rightfully looks only, to his own advantage.

The conclusion upon this point is, that the survey was merely void, that it gave no title, and that no title can be derived from it, the proprietors themselves having no right in a navigable river, nor any power to grant.

The next evidence of title exhibited and relied upon by Mr. Humphrey, is an act of the legislature of the State of New Jersey, dated the 24th November, 1831, granting to Henry Gale, his heirs and assigns, "all the right and title of the said State of New Jersey to the said island called the Pea Patch, situate in the river Delaware, in the township of Lower Penn's Neck, in the county of Salem and State of New Jersey, as mentioned and described in the before mentioned survey," meaning the survey of 1784.

This act, it will be seen, was passed about seventeen years after the present controversy began, and during the time the United States were in actual possession of the island. The counsel of Mr. Humphrey, in the course of the argument, objected to the cession of the island to the United States by the State of Delaware, on the ground that the State was not in possession, but it was adversely held and possessed, and therefore could not be lawfully conveyed. The same objection applies to New Jersey. Whether such is the law of New Jersey or Delaware, is not known. It is believed not to be so. But it is not material to inquire into the matter, nor to examine particularly the evidence of possession, for a reason which seems to be a sufficient answer. Both acts of the respective legislatures, besides operating as grants, being passed with all the forms and sanctions of the constitution, were also acts of legislation, and, no third right intervening, could pro tanto repeal the general law, and give the required ability. Such would be their effect. If, then, the Pea Patch island was within the limits of New Jersey, and subject to her jurisdiction, there is no doubt of the sufficiency of the grant to pass the title of the State. The same may be said of the State of Delaware, whether they had champerty laws or not. It remains, too, to be shown that a sovereign State can be affected by adverse possession, unless so long continued as to found a presumption of grant.

It may be further remarked, that in this act the State of New Jersey does not assert a right or title. In the preamble the act recites the survey of 1784, the mesne conveyances to Henry Gale,

and then proceeds as follows: "and whereas, it *hath been suggested* that the State of New Jersey hath some title thereto, and by reason thereof doubts have arisen concerning the title of the said Henry Gale," and then goes on to grant "all the right and title of the said State of New Jersey." This remark, it must be observed, does not affect the legal sufficiency of the grant to pass all the right of the State, and entitle Mr. Humphrey to claim under it. It is good between him and the State of New Jersey, and entitles him to vouch in his own behalf all the well founded claims of the State. But the grant is not in the ordinary form of a conveyance of land. It is only a quit-claim, which one may give to quiet doubts, whether he has a right or no right. The value of the fact is only as it shows, that as late as 1831, when the island, by great expenditures upon it by the United States government for works of public defence, had become an object of general attention and interest, the State of New Jersey made no assertion of right. The act, for a mere nominal consideration, simply relinquishes whatever right, if any, the State may have. And this remark may be further extended. It is believed that there has been no evidence to show that the State of New Jersey ever has claimed the title to be in her. It may be admitted that the proprietors of west New Jersey did assert a right by the acceptance and approval of the survey. But they did so, in their own behalf, adversely to the State, under a claim which is now settled to have been unfounded.

In the recital, however, there is a statement entitled to some attention, in connexion with a part of the charge of his honor, the late Judge Baldwin, in the ejectment tried in the circuit court for the district of New Jersey. The recital is, that, by virtue of the survey, "Edward Hall and Clement Hall became seized and possessed," and that, by divers mesne conveyances, Henry Gale "hath become seized and possessed." The natural and the legal import of this language is only this, that the constructive legal possession of vacant land follows the right, and it must be admitted that, if the survey had given the right, he would have been, in this sense, in possession. But the proprietors themselves having no right or possession, could give none to their warrantee.

Judge Baldwin, in the latter part of his charge, comes to the following conclusion: "In the year 1784, this island was surveyed for Edward and Clement Hall on a west Jersey proprietary warrant, under which it was held until their title became vested in the plaintiff. From this time, he stood in place of the west Jersey proprietors, entitled to all their rights by prescription against the crown, against the Penns and the State of New Jersey; and, in his own right, by his possession, such as it was, entitled to the benefit of any limitation which had commenced or begun running from the date of the survey. As there was no adverse possession or claim, his legal seizin or possession continued till his dispossession by the United States in 1815, a period of 31 years, which would bar the right of entry of any adverse claimant; and, connected with the general claim of the proprietaries of New Jersey to the islands in the Delaware from 1739, would make the title good by a prescription of

74 years of quiet enjoyment, adverse to any right under the deeds of the duke of York to Wm. Penn." He then concludes that the title under Gale is derived from the proprietors and is good, and, as has been seen, adverse to the State of New Jersey.

Unnecessary criticism upon the charge of Judge Baldwin, is forbidden by the respect due to the memory of a learned and able man, who so long filled an eminent judicial station. The several legal principles contained in the paragraph just quoted are neither affirmed nor disaffirmed. Nor is it required to point out the one great error which vitiates the whole of the charge. It has already been done authoritatively. The case of Martin *vs.* Waddell had not then been decided. The decision since has established a different doctrine from that of Judge Baldwin, upon full discussion and deliberate consideration, and in concurrence with the judgments of the courts of New Jersey, that, from 1702, the proprietors never had any right in navigable rivers, and, as there will be occasion to consider more fully hereafter, the right of the State did not come into existence until the 4th of July, 1776. Its origin is thus distinctly marked, being connected with the great public event of that day, which will never be forgotten, as it was the birthday of a nation, and registered with an exactness of which there is probably no other example in the annals of the world.

This then leads directly to the inquiry, whether the Delaware river was ever within the charter limits of New Jersey; in that part of it where the Pea Patch island has since grown up. If it were, the right would have become vested in the crown by the surrender of 1702, would have so continued until the 4th July, 1776, and then would have passed to the State of New Jersey as a part of her sovereignty, acquired on that day by severing her connexion with Great Britain, and assuming to herself all the powers of government. The derivation would thus have been from the crown, though not by grant. To maintain that the part of the river in controversy was within the charter limits of New Jersey, the counsel for Mr. Humphrey have produced the following deeds and papers: Patent, 12th, March 1603–4, from Charles the II., king of England, to his brother the duke of York, his heirs, and assigns, for a large tract of territory, including what is now the State of New Jersey, the last boundary of which (now the west boundary of New Jersey) is as follows: "and all the lands from the west side of the Connecticut, to the east side of Delaware bay."

Lease and release, 23d and 24th June, 1664, the duke of York to John, Lord Berkely and Sir George Carteret, reciting the grant from the king to the duke of York, grant and convey "all that tract of land adjacent to New England, and lying and being to the west of Long island, and Manhitas island, and bounded on the east part by the main sea, and part by Hudson's river, and hath upon the west Delaware bay or river."

Patent 29, June, 1674, Charles the II. to the duke of New York, for New Jersey by the same description as before. Between this patent and the former one, New York had surrendered to the Dutch, and it is stated that the people of New Jersey sent deputies

to New York, and swore allegiance to the States General and the prince of Orange. In February, 1674, a treaty of peace was signed between England and the States General, by which New York and New Jersey were restored to the English. This deed is supposed to have been made to remove all doubts which might arise from these occurrences.

There is no necessity for tracing the conveyances further. The title is regularly declared to the proprietors of east New Jersey and west New Jersey, between whom the province was held in the portions it had been divided into by a partition theretofore made, and by the lines and boundaries then fixed.

In 1702, the proprietors of New Jersey surrendered to the crown the powers of government, and thenceforth were only private proprietors.

Returning, then, to the question, whether the Delaware river at the part of it now in controversy was within the charter limits of New Jersey, there can at this time of day be no question. It was not within the grant, and as far as is known, there has never been a dissentient opinion.

In 1721, the question was submitted to the law officers of the crown by the commissioners of trade and plantations. The opinion of Robert Raymond, attorney general, and Philip Yorke, solicitor general, will be found in the first volume of Chalmers' opinions, p. 59. They say, as follows: "We have perused the said clauses," (in the charters of New Jersey and Pennsylvania,) "and have been attended by the agents of the parties, who claim the province of Pennsylvania, and their counsel, who laid before us a copy of the letters patent granting the said province, and have heard what have been alleged on both sides; and, upon consideration of the whole matter, are of opinion that no part of Delaware river, or the islands lying therein, are comprised within the granting words of the said letters patent, or of the said annexed extract of the grant of New Jersey; but we conceive the right to the same still remains in the crown." The opinion seems to have been acquiesced in, for there appears to have been no further proceedings before the commissioners of trade and plantations, nor before the king in counsel, whom the commissioners were sometimes employed to aid in colonial investigations; and if it should be suggested that there were no agents present on the part of New Jersey, the answer is, the question was one and the same as to both, for Pennsylvania was bounded by the Delaware on the east, just as New Jersey was on the west.

Some stress might, perhaps, be laid upon the nature of this opinion, partaking, as it does, of the character of a judicial proceeding, and some, too, upon the names of the eminent men by whom it was given, and the high stations they afterwards adorned. But this is needless. The law of nations furnishes the same rule of decision. Here was the crown owning a large territory on both sides of a navigable river, (for, at the time of the latest of the patents to the duke of York, neither the grant of the three lower counties, nor of Pennsylvania, had been issued,) and he makes a conveyance of territory

on one side of the river, bounding on, or bounded by, the river. Is the river, or any part of it, included in the grant? This is the very question which came before the Supreme Court of the United States in Handly's lessee *vs.* Anthony, (5 Wheat.,) in the year 1820. The decision of the court was delivered by C. J. Marshall, that the grantor retains the river within his own domain, and the grantee extends to the river only, and the low water mark is his boundary. The same point was decided, in the same way, by the supreme court of New Jersey, in Arnold *vs.* Mundy, (1 Halstead, 1,) in 1821, with only this difference of expression, "the grant is to the edge of the river only," leaving a doubt whether it is a line shifting with the rise and fall of the tide. The same point, as to the limits of New Jersey on the Delaware river and bay, namely, that it was bounded by the low water mark on the east side, was decided by Judge Washington, in Corfield *vs.* Coryell, (4 Wash. C. C. R., 371,) in 1823; by Judge Baldwin, in Bennett *vs.* Boggs, (1 Bald., 60,) in 1830; and it was approved by him in the lessee of Gale *vs.* Beling, in 1833–4. It must, therefore, be considered as settled that, by her charter limits, the territory of New Jersey extended only to the low water mark of the Delaware river on the east side, and included no part of the river. It is, accordingly, so considered.

The States of Pennsylvania and New Jersey, as has been seen, being both bounded by the low water mark on their respective sides, and the river itself belonging to the crown, upon the declaration of independence, a new state of things arose. The right of the crown was extinguished, and the river lay vacant, a boundary between them. "When," says Chief Justice Marshall, (Handly's lessee *vs.* Anthony,) "a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream." The States of Pennsylvania and New Jersey adopted this rule. In 1783, a compact was made by commissioners mutually chosen, which was ratified by acts of their respective legislatures, in 1785. By this compact, concurrent jurisdiction upon the water was given to both States, with some restrictions not necessary to be detailed; some islands were specifically allotted to each State, probably from motives of convenience; and it was agreed that the rest should belong to the State to which they lay nearest, and that all islands which should thereafter be formed in the river, should be governed by the same principle. This agreement was limited southerly to "where the circular boundary of the State of Delaware toucheth upon the same," (Delaware river.) As between Pennsylvania and New Jersey, this compact was formed upon great deliberation, and with a full knowledge of the subject, as must be believed from the high character of the commissioners on both sides, and is in conformity with the principles afterwards laid down by the Supreme Court of the United States in the case, before cited, of Handly's lessee *vs.* Anthony.

If, then, that part of the river Delaware lying between the States of New Jersey and Delaware, which includes the Pea Patch island, was in the crown on the 4th July, 1776, "the original property not

being in either," it would, on that day, have become vested in the two States. In that case, New Jersey would be entitled to the eastern portion of the river, though not within her charter limits, succeeding to that extent to the rights of the crown, which had been divested by the declaration of independence. Delaware, in the same case, would be entitled to the western portion. Both would commence their right from that day. How the line would be drawn, or whether it would place the island on the side of the one State or of the other, it is not material to inquire; for the views to be taken renders it unnecessary.

The question, having already shown that the "original property" was not in New Jersey, is thus reduced to the single inquiry, whether, on the eventful day referred to, the right to that part of the river was in the crown of England, or whether the "original property" was not in the province or colony which then became the State of Delaware. The "original property" of Delaware, that is, her title previously acquired and continued up to that day, becomes, therefore, the subject of examination, and has been accordingly examined, carefully and deliberately. The evidence, as far as necessary, will now be stated.

The title begins with two deeds of the 24th August, 1682, commonly termed the deeds of feoffment, from James, duke of York, to William Penn. The first of these deeds grants and conveys to Mr. Penn, his heirs and assigns forever, as follows: "all that the town of Newcastle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate lying and being upon the river Delaware, and all islands in the said river Delaware, and the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles about the same town." The deed then covenants for further assurance, and appoints John Moll, esquire, and Ephraim Herman, gentleman, his attornies, jointly and severally, to enter into and take possession and seizin of the premises, and to deliver possession and seizin to Mr. Penn, his heirs and assigns.

The second of these deeds conveys to Mr. Penn all the territory from the south line of the preceding deed, that is, from "twelve miles south of Newcastle, and extending south to Capin Lopin," meaning Cape Henlopen. In this deed, there is no grant of "islands in the said river Delaware, and the said river and soil thereof."

These two deeds, it will be perceived, embrace the whole of the territory of what were called the "three lower counties," now the State of Delaware.

On the 28th October, 1682, the attornies appointed in the deeds of the duke of York made livery of seizin to Mr. Penn of the first of the tracts, of which a record is made and is still preserved, and is, in all respects, exact and particular. On the 7th November, 1682, as also appears of record, livery was made of the tract in the second grant to Captain William Markham, Mr. Penn's attorney. The declaration is signed by twelve witnesses, "in the Delaware river," probably on their passage up from below

the twelve miles. Of both a record was made, and still remains, in all respects, exact and particular.

There is this remarkable difference in respect to the two grants; that, in the first, the livery is stated, besides "twig and turf," to be of "water and fowl of the river Delaware;" in the other, it is of "the land, soil and premises" in the indenture mentioned.

They state, also, that Mr. Penn remained in quiet possession. John Moll, the attorney appointed by the duke of York to deliver seizin, in his certificate, also recorded, is still more precise. Of the livery, under the first deed, he says they "did give and surrender to the said W. Penn, esq., actual and peaceable possession of the fort at Newcastle, by giving him the key thereof, to lock upon himself the door; which being opened by himself again, we did deliver also unto him one turf, with a twig upon it, *a porringer, with river water, and soil*, (soyle,) in part of all that was specified in the said indenture," &c. As to the other, he says that a few days after they went to the south side of Apoquimining creek, by computation beyond the twelve miles, and there made livery of seizin of the lower part. The distinction thus made it may be necessary hereafter to refer to.

From a book kept in the government at New York, begun in 1682 and ending in 1683, a copy has been produced of an entry, or paper, of course made during that period, from the commander and council, beginning thus: "The record of the commander and council; declaration on Esquire Penn's grant for Newcastle, St. Jones and Whorekills, by the commander and chief, in council." It then proceeds to recite the two deeds from the duke of York to Mr. Penn, of the 24th August, 1682, setting out, at large, and accurately, the description in each; states the appointment of attorneys to deliver free and actual possession, and adds: "as by the said indentures here produced, and shown to us, and by us well approved and entered in the public records of this province, doth and may more at large appear, and we being thereby fully satisfied of the said William Penn's right to the possession and enjoyment of the premises." The paper, which is addressed "to the several justices of the peace, magistrates and other officers, at Newcastle, Saint Jones, Deale, also Whorekill, at Delaware," or within any of the bounds and limits above mentioned; and then, after thanking them for their good service, during the time they had remained under his royal highness's government, dismiss them, "expecting no further account than that you readily submit and yield all due obedience and conformity to the powers granted to the said William Penn, in and by the said indentures, in the performance of which we wish you all happiness."

John Moll, in the certificate before mentioned, after stating the livery of seizin already referred to, adds this statement: "Which acting of us was fully accepted and well approved by Anthony Brockhold, the commander-in-chief, and his council, at New York, as appears by their declaration, bearing date the 21st November, 1682; from which jurisdiction we had our dependence all along, ever since the conquest, until we had made the above related deli-

very unto Governor William Penn, by virtue of his royal highness's orders and commands."

On the 28th October, 1682, as appears from evidence of record, sundry inhabitants of the town of Newcastle upon Delaware river, having heard the first of the two deeds read, and having seen the possession delivered by the duke of York's agents, "whereby we are made subjects under the king to the said William Penn," make a solemn promise, in the presence of God, to yield him obedience, and to live quietly and peaceably under his government. Soon after an act of naturalization was passed.

The objection to these two deeds, however, is, that the duke of York himself had at that time no grant for the premises from the crown, and therefore had no title to convey. It is certain that no such grant has been produced, and it is assumed, as a fact, that no formal grant had been made to him by the crown. But, if the question were open, there would be grounds for believing that the duke of York was some how empowered to deal with the territory on the west side of the Delaware river, and the river itself, as connected with the operations he was conducting to protect or recover it from the Dutch. Not that being a subject, he could acquire any right for himself by conquest, which cannot be pretended, but that in such a war, for enabling him to quiet the inhabitants, or strengthening the defence of the country, it was not unnatural nor unreasonable to suppose that he might be entrusted with a large discretionary power, and even with rights in himself for its better execution, especially considering the relation he stood in to the king, and that he was himself the heir presumptive to the crown. John Moll says, they always "had their dependence from the jurisdiction of New York," which was the duke of York's government, and it was by that jurisdiction we have seen that the actual transfer of the powers of government was made to William Penn, which he began immediately to exercise. There is other evidence to the same effect. The duke of York and his governors did make grants along the Delaware, and did confirm titles derived from the Dutch and the Swedes. There are instances of titles beginning with the Swedes, confirmed by the Dutch, afterwards confirmed by the duke of York and his officers, and always treated with respect. But there is another transaction of those times of public notoriety, more important than any of these, not only on account of its magnitude, but also for the judicial interpretation it has received. In 1781, William Penn obtained his charter for the province of Pennsylvania, bounded on the east by Delaware river, from twelve miles north of Newcastle town, and on the south by a circle drawn twelve miles north of Newcastle. On the 21st August, 1682, the duke of York gave him a release of all his claim upon the province. In the recital it is stated that he "is willing and pleased to confirm and make any further assurance of the said tract of land and premises unto the said William Penn and his heirs." This deed has always been deemed a part of William Penn's title; and, furthermore, it has been held that he took subject to grants previously made or confirmed by the duke of York's government. The Swedes held a large body of land immediately

below the city of Philadelphia. The titles derived from them are still respected. They owned also the land now occupied by the city of Philadelphia. William Penn obtained it from them by exchanging lands on the Schuylkill. And yet there was no formal grant from the crown to the duke of York.

But it is unnecessary, for a reason that will presently appear, to persue this *enquiry* further. Perhaps, indeed, the duke of York by subsequently accepting a patent from the crown, and those deriving from him, if they claim under that patent, must be deemed to be concluded by it from setting up any prior title in the duke of York.

Be that as it may, the important fact deduced from what has been stated, and leading to consequences in law which will be more fully developed as the history advances, is this: that it was under these deeds, by the description and boundaries contained in them, and none other, and with the possession and seizin then delivered, that the three lower counties became, at least, de facto, a province or colony, and acquired a name and identity which they maintained thenceforward for a century, less only six years, and then, of their own will, exchanged for the higher title of a sovereign and independent State. The same community still exists after nearly three quarters of a century more, with only such modifications as it has chosen to make in the mode of its existence, and as it rightfully might make, but still preserving its identity as the same corporate body which first had its being in the year 1682. The province was, and always continued to be, an unit.

Immediately after, the freemen began the work of government by acts of legislation. The first act (7th December, 1682) was the "act of union." In the volume of laws referred to, this act is immediately preceded by the two deeds from the duke of York to Mr. Penn, set out at large. The preamble recites the patent for Pennsylvania, and the release from the duke of York. It then goes on to set forth the two deeds from the duke of York for the three lower counties, giving in full, and accurately, the description in each, and especially in the first, the words, "as also the said river of Delaware, and soil thereof, and islands therein;" and states that the freemen of those counties have desired to be annexed to Pennsylvania. The enacting part follows, providing for the union, and for the naturalization of such of the inhabitants as were foreigners. Then follows sundry other acts of legislation in the same year, constituting the body of laws well known by the name of "the great law." They profess to be enacted by the deputies of the freemen of the province (Pennsylvania) and the counties afore aid (the three lower counties.) The legislature was, indeed, constituted of equal numbers from the province and counties. To understand the whole bearing of this evidence, it must now be remembered that these laws were to be transmitted and delivered to the privy council in England, and, if disapproved by the crown within six months from the delivery, and so declared, were to become void; otherwise, to remain and stand in full force, "according to the true intent and meaning thereof." The "act of union" was, of course, submitted to the council, and approved by

the crown. Looking at the recitals and enactments of that act, and its preamble, it is impossible to avoid saying that the crown assented to them, thus acknowledging the validity and legal operation of the two deeds from the duke of York, the boundaries defined in them, the possession and right of possession according to those boundaries, and the rightful exercise of the powers of government under them. An existing colony was thus acknowledged as rightfully created, and lawfully enjoying the powers and privileges of a colony by known and settled boundaries; and this acknowledgement was by all who had an interest. New Jersey had none, Pennsylvania had none, the duke of York had none. The new province encroached upon none of them; Lord Baltimore asserted a claim on the land, but it was afterwards decided to be unfounded. The crown alone could object, and the crown assented. This assent, let it also be borne in mind, was not an informal and hasty one, nor upon insufficient knowledge. The king was in the exercise of his royal power, was aided by his privy council, and had full information before him of all the facts necessary to enable him to understand what he was doing. That he could, if so minded, have retracted his assent, it would be difficult to maintain. But he never did retract his assent, nor intimate any disposition to do so.

On the 22d March 1682–'83, Charles II. made a grant by patent to James, duke of York, of the same premises which had about seven months before been conveyed by the duke of York to Mr. Penn. This deed in its description is the same, precisely, as in the two deeds of the 24th August, 1682. It describes separately, and grants separately, the two parts of the lower counties exactly as in those deeds. The only difference is, that in the former, there are two instruments; in the latter, only one.

The original patent was here produced—brought from England some years ago by the late John R. Coates, esq., (who was an agent of the Penns,) where it was given to him by John Penn, esquire, a lineal descendant of William Penn, from among the title papers of the Penn family, rather, it was understood as a thing no longer of use to him, which might gratify curiosity in Pennsylvania and Delaware, than for any other purpose. At Mr. Coates's death it went into the hands of Jacob G. Morris, esq., who has carefully preserved it, and now comes to us from the possession of Mr. Penn, with a presumption that it has been there accompanying his possession as a part of his title.

Of this deed there have also been produced various exemplifications; one from the rolls in England, one from the records in Delaware, a copy, sworn to be a copy, before the lord mayor of London, in 1735, and perhaps others. It is referred to, also, in the votes of the assembly. The original, *or a sworn copy or exemplification of it* was an exhibit accompanying the bill of the complainants in the case of Penn *vs.* Lord Baltimore, filed in the high court of chancery of England, in the year 1735, and was in evidence in that case; and the original was offered to be, and probably was, produced.

If this deed had preceded the deeds of the duke of York, the regular derivation of the title from the crown to the lower counties could not have been disputed, and there would have been no question open but upon the construction of the terms of the patent, as to what was conveyed. But above a century ago, in the case just cited of Penn *vs.* Lord Baltimore, the defendant set up the argument against the Penns, supposed to be derived from this order of the instruments, "that the grant to the duke being made after the deed by the duke to Penn, this grant must have been for the duke's use, and not for Penn's." The answer on the other side was, "We have a fact that will determine that case; for we have the very original charter itself, under the great seal, in our custody, ready to produce, which if the duke had intended for himself, and to defeat our title by, he would have kept, and. not Mr. Penn, who was at this time of passing it, and for a considerable time longer, over in America." These things are gathered from a large folio printed book, (belonging to Thomas Gilpin, esq.,) produced on the part of the United States, which contains the pleadings and evidence in the case, and has been called by the counsel "The paper book." The case was decided by Lord Hardwicke, in 1750, and is reported in 1st Vez., 444. As the decision is deemed to be of great weight, in every aspect, and made a final end of all controversy in England, (for there never has been a dispute since,) and thus fixes a new epoch in the history of the province, it will be conducive to the right understanding of its proper bearing upon the immediate subject of controversy, to look back upon the earlier evidence which has been produced upon the hearing of the present case.

The foundation of the new province upon the basis of the deeds from the duke of York, the exercise of legislative power, the declaration of allegiance in Newcastle, and the union with the province of Pennsylvania, all approved by the crown of England, have already been seen. The union appears to have been only a sort of league, betraying a want of cordiality in the beginning, and leading very soon to uneasiness and dissatisfaction; and after a few years of restlessness and irritation, they finally separated, (with Mr. Penn's consent,) in 1703. In the following year an attempt was made to bring them together again, and the people of the lower counties would appear to have been willing; but the people of Pennsylvania would not consent. From 1703, therefore, they became separate provinces, to all intents and purposes, (except that the government powers and right of property in both were in Mr. Penn,) and so continued till the revolution. In this respect Judge Baldwin was misinformed, and supposed the union to have remained uninterrupted.

Very soon after the deeds, Lord Baltimore set up a claim to a large part of Pennsylvania, and to the whole of the lower counties, quite to the Delaware river, upon the allegation that they were embraced in his patent. In 1685, the council to whom the jurisdiction belonged decided against him, directing a line to be run north and south, which is the present western line of the State of

Delaware. Soon after an agreement was entered into between Mr. Penn and Lord Baltimore, for settling all disputes between them.

In 1692, Mr. Penn was removed from his government, and Benjamin Fletcher was appointed by the crown. The general ground for this measure was, that disorder had occurred in his government. There was no question about title, nor was either province disturbed. They went on as before. In 1694, Mr. Penn was restored, and the government descended to his children. There has been a very general belief, that the real offence of Mr. Penn was his supposed regard for the Stuart family, and particularly for James 2d, then banished from the throne and kingdom.

In and about the year 1711–'12, a surrender of his government powers to the crown was contemplated by Mr. Penn, and it is understood that a negotiation for the purpose was considerably advanced, when his capacity to proceed further was arrested by illness, which prostrated his mind and memory for the remainder of his life. Pending the treaty, the crown consulted the attorney general, Edward Northey, and his opinion, as reported by him, is in Chalmers's collection, page 32, dated February 25, 1711–'12. Mr. Northey, among other things, says, "and he has made out to me his title thereto," that is, to the government of Pennsylvania, and of the "town or colony of Newcastle, alias Delaware." This was in the time of Queen Anne.

In 1717, the earl of Sutherland, alleging that he was a creditor of the crown to the amount of £20,000, applied for a grant of the three lower counties. It was referred to the attorney and solicitor general, Edward Northey, before mentioned, and W. Thompson. They made an elaborate report, which is published by Chalmers, page 39, dated October 28, 1717. They heard the parties, who were before them—the earl of Sutherland on one side, and on the other, "Mr. Penn's mortgagees and other purchasers under him." Mr. Penn took no part. They state, also, that no deed from the crown was produced. For both these things they give a very sufficient reason, when they say, (p. 45,) "but they presume the said late duke of York might have some other grants thereof, which Mr. Penn might give an account of, but cannot, '*being under a lunacy.*'" Mr. Penn died in the following year, 1718. They conclude their report by submitting for consideration, "whether it will not be reasonable that your Majesty's title should be established by the court of chancery, before any grant should be made of the premises." This was in the reign of George the 1st. The application does not seem to have been further pursued, nor was any use made of the hint about chancery on that application. The title, therefore, passed undisturbed by the crown, through five reigns and a revolution, and the province continued as it was founded in 1682, though it was always in view of the authorities of England, and as has been seen, frequently subjected to the examination of the king's legal advisers.

In 1735, William Penn being dead, a bill was filed in the high court of chancery, in England, by John Penn, Thomas Penn, and Richard Penn, his sons, against Charles Calvert, Lord Baltimore,

to enforce the performance of the agreement made in the preceding century, for fixing the boundaries between Pennsylvania and Maryland, and between Maryland and the lower counties. Recurring now to the advice of Mr. Northey and Mr. Thompson to the crown, to have the question of title determined in chancery, there is no reason to doubt that this suit was allowed, if not directed, by the privy council. "It is certain," says Lord Hardwicke, replying to an objection to his jurisdiction, "that the original jurisdiction in cases of this kind, relating to boundaries between provinces, the dominion and proprietary government is in the king and council." "The king, in council, is the proper judge of the original right." He adds, that the king, in council, might look upon the agreement, and allow it as evidence of the original right, but he could not decree it as an agreement. "And, therefore," he says, "the lords of the council have remitted this matter, very properly, to be determined in another place, on the foot of the contract." Lord Hardwicke was well aware of the questions to be decided finally in this case, as appears in the striking exordium of his judgment, "it being for the determination of the right and boundaries of two great provincial governments and of three counties, of a nature worthy of the judicature of a Roman senate, rather than of a single judge;" adding, "and my consolation is, that, if I should err in my judgment, there is a judicature equal in dignity to a Roman senate, that willcorrect it." No appeal was ever taken to the House of Lords.

In the decree, liberty was reserved to either party to apply to the court, if, by "any act or right of the crown," execution of it should be obstructed. This liberty was never used. No act or right of the crown was interposed.

One of the objections, among many, made by Lord Baltimore, was upon the order of the deeds—that is, that the deed to the duke of York was subsequent to his two feoffments. Lord Hardwicke lays aside the doctrine of estoppel, evidently not because it was inapplicable or insufficient in law for answering the objection, but because the expression of it was unnecessary, and perhaps inconsistent with the deference due to the crown. What his opinion was, is evident enough; for he says, "the duke being in the nature of a common person, was in a condition to be estopped." Being liberated from the restraints of the lord chancellor, we are at liberty to say, that the duke, at the date of the deeds, being a subject, was, in this respect, only "a common person," and as much bound by an estoppel as any other subject. He did not succeed to the throne till two years after. Admitting it to be true (which cannot be admitted for reasons it would take too much time now to enter into) that the king is not bound by estoppel, it would be an unreasonable and most unjust stretch of the prerogative to suppose that, when a man ascends the throne, he is liberated from all estoppels he had previously incurred as a private person. It might as well be contended that he is freed from all grants he has previously made; for the real equity of an estoppel, in such a case as this, is neither more nor less than to make the two deeds

operate as one grant, and thus do plain justice between the parties. It is no subtlety nor refinement of law, but the natural dictate of common sense and common honesty. There may, perhaps, be instances of estoppel, such as from recitals and the like, which would affect a private man, and do not touch the king; and, on this account, what is now said is limited to the very case in question. The conclusion is, that the deed of 1683 was an estoppel.

But there is another answer to the objection which satisfied Lord Hardwicke, and is fully satisfactory. If there were no estoppel, and the deed of 1683 vested the legal right in the duke of York, where it remained when he became king, he was a trustee, a royal trustee, and the equity would be in Mr. Penn, or in the people of the province, it matters not which. That the king can be a trustee, would seem to be settled, whatever may have been formerly thought, from a supposed analogy to the doctrine of uses. Lord Hardwicke is authority for this, in Penn *vs.* Lord Baltimore. So is the earl of Kildare *vs.* Eustace.—1 Vern., 439. So is Burgess *vs.* Wheate.—1 Eden., 223. Trusts have, in equity, a sort of independent existence for their own preservation. With reference to the trustee, actual confidence in the person is not essential. Hence, a corporation may be a trustee, and so may the king. Indeed, it is an established maxim of equity, that a trust shall not perish for want of a trustee. The real difficulty, in the case of the king, is about the remedy. "The arms of equity," says Lord Northington, in Burgess *vs.* Wheate, "are very short against the prerogative." Chancery, the appropriate forum of trusts, is without power, because it is said "it has no jurisdiction over the king's conscience; for that it is a power delegated by the king to the chancellor to exercise the king's equitable authority betwixt subject and subject." So said by counsel in Pawlett *vs.* Attorney General.—Hards., 468. Hence, the caution of Lord Hardwicke, in Penn *vs.* Lord Baltimore. "I will not decree a trust against the crown in this court," though he did not hesitate to declare his opinion that the king was a royal trustee. The right of the cestui que trust, however, is not questioned; nor is it questionable. There has been a suggestion that, in such cases, perhaps relief might be obtained through the exchequer, and the subject may certainly prefer a petition of right. But that is not material to the present purpose. If the right be established, no remedy is wanted; and that the equity is sufficient to raise a trust is clear, as well from what has been stated, as also from the covenant for further assurance in the deeds of 1682. There was, at all events, therefore, an equitable estate, which is quite as available as a legal estate.

This decree of Lord Hardwicke settled the validity and legal sufficiency of these deeds, the right of the province under them, and, of course, its boundaries, as described in the deeds. No appeal was taken, nor did either party ever apply, under the reservation in the decrees, to set up any "act or right of the crown." It was universally acquiesced in, and became, by its own force and common consent, the law of the land from that time forth, till the crown of England ceased to have power either to confirm or to dis-

pute the rights about which it was made. Now, this was the same province which had been founded, as we have seen, in 1682; these were the deeds under which it was founded; and these were the boundaries by which it had been defined from the beginning.

Twenty-four years more elapsed, without controversy or question in England, its boundaries acknowledged by the crown, (the crown, in truth, had never disputed them,) when the delegates from "Newcastle, Kent, and Sussex, on Delaware," on the 5th September, 1774, met the delegates from the "several colonies and provinces in North American, assembled at the Carpenter's Hall, in the city of Philadelphia.—Journals of Congress, 1774. New Jersey had also delegates there, and so had Pennsylvania and Maryland, all immediate neighbors, by whom they were bounded.

As a province or colony they were received, having a definite existence under the crown of England. Such as this province was under the crown of England on that day, such was she acknowledged to be by being received into that Congress. On that day, we have seen this colony's rights under the crown, and her boundaries, which were part of them, had stood the shocks of twenty years of controversy, and finally were settled by a solemn decree in chancery, and rested securely and quietly upon the foundations laid in 1682. In the struggles and hazards which ensued this province took her full share. On the 4th July, 1776, she declared herself a sovereign and independent State, by the name of "Delaware," and by the united efforts of herself and her sister States was enabled to maintain it. But this State was the same that was a feeble colony in 1682, with the same metes and bounds; the same that in her more advanced age had had her metes and bounds judicially established by the high court of chancery, and, let it be added, whose boundaries had never been even questioned by the crown from the beginning, but in every way sanctioned. Could such a State, after all this, be called upon to vindicate her orignal rights? Lord Baltimore had a long controversy with her, because their grants interfered. But it was settled in England before the revolution. The State of Maryland has never claimed to revive it. With New Jersey there was no interference, nor is there now. New Jersey has had no controversy with Delaware, and has none at present, so far as is known. When Delaware became a State there was no subsisting controversy with any body as to her boundaries. The change which then took place was from the condition of a dependent province of the crown of England to that of an independent sovereign State, achieved by conquest. Allegiance to England was thrown off; the royal rights reserved by charter were ended, and with them the government powers of the proprietaries derived from the crown, and all their incidents. They fell together, at the same time. The blow was not struck at the proprietaries. It was aimed at the crown, and when it took effect there the subordinate government gave way with the head it depended upon, and ceased to exist. As far as there was any derivation in the case it was, in this sense, from the crown of England; and if

there had been (as there was not) an outstanding royal claim of any sort, that, according to Martin *vs.* Waddell, would have instantly become vested in the new sovereignty. From this view it follows, unavoidably, that if the deed from the king to the duke of York had never existed, but only the two deeds from the duke of York, still—as the province had been founded under them, had existed upon its original foundation for nearly a century, was *de facto* a province or colony, and received as such into the union of the colonies, and was by them all declared to be a State of the Union, has been so ever since, and still is so—it would be very difficult indeed to to maintain that her limits and boundaries were not incontestably proved by those deeds, unless they interfered with some superior and better right. The *de facto* existence became a legal one, to all intents and purposes, by the affixing of her own sovereign seal, which had superseded the great seal of England, and acquired all its virtue and power. If necessary, this view might be carried even further. A colony or province, without any deed at all, would, under the like circumstances, have become a State; and if, from the 4th July, 1776, to the present day, she has been, and still is, a State of this Union, with the same rights and privileges as the other States, and there were any authentic document to prove her boundaries, (though not a royal patent or grant,) and they interfered with no other rights, it would be very difficult to impeach her title. But even if the royal consent or recognition were indispensable, it is surely to be found in the treaty of peace for Delaware as clearly as for any other State. And now, it is proper to remark, that all the arguments urged against her upon the very question to be decided, namely, her rights in the river, the islands, and the soil, however they may profess to be restricted, have one common fault; they go too far; they prove too much. They would take away the whole right of Delaware, land, river, islands, and all. For example, one of the learned counsel has produced the charter or patent to Lord Baltimore, and insisted that it went entirely to the river Delaware. If so, and it is in force now, the whole territory of Delaware on the main land would be taken away, and nothing left but the river right, if, indeed, that could stand alone. Whereas, as has been shown, the right between them was decided in council, in 1685, the 13th of November, by fixing the present line; they entered into an agreement between them in conformity, and the specific performance of that agreement was decreed in chancery in 1750. The original right has never been open since. Judge Baldwin, on the other hand, allows her title to the main land to be good by possession, which, it is respectfully submitted, is a low and precarious ground to place the title of a State upon; but he seems to deny any right but possession, and altogether to deny it as to things which were not of a nature to be actually possessed. These objections are now too late, if they ever had any foundation at all. They were long ago decided and settled in England. They were decided and settled at the revolution; and, as to her boundaries, they stood defined and authenticated in the deeds of the duke of York, in the patent of

the king, in the proceedings of council, and in the high court of chancery, never having undergone a change from what they were at the beginning.

This course of observation, however, must here be suspended for a moment to examine the construction of the deeds, as respects the immediate question upon original grounds, lest it might be supposed that they were doubtful or insufficient, or stood in need of aid, to give them a meaning they do not of themselves properly import. Upon a careful and deliberate consideration of the whole subject, and of the arguments urged against the right of Delaware, it is believed, that the deeds are quite clear. The question is, did the boundaries of the province go into the Delaware within the twelve miles circle, or did they not? The first great rule in regard to such inquiries is, that there is to be no interpretation where there is nothing that requires to be interpreted. If the words be clear in themselves, they are to be accepted. "Words," says Rutherforth, are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation.—Inst. Nat. Law., b. 2, c. 7, § 2. And for this he cites the support of Grotius.—B. 2, c. 16, § 1. This is the same rule that is laid down by Blackstone.—1 Com., 59. They all agree, too, that words are to be taken in their most usual and known signification and technical terms and terms of art, according to the interpretation of the learned in each art, trade, or science. And how can it be otherwise? Words make contracts between parties, which are to be understood in one sense by both. How can that be, unless there be a standard to be resorted to, as nearly fixed as possible, especially, in the more important transactions of life? Now, if with this single rule, any man, learned or unlearned, will read the duke of York's deed for the upper part of the province, and that part of the king's deed which is for the same, he will be at no loss to say what it is that they grant. They are the appropriate legal words for the purpose, and evidently used skilfully and upon deliberation, and with comparatively accurate knowledge, for the New Jersey grant and the grant to Lord Baltimore, and the charter of Pennsylvania, were all prior, and there had been a long contest with the Dutch and Swedes, who had settlements and forts on the west side of the Delaware river, from cape Henlopen to the north line of the city of Philadelphia, where they had been in possession for nearly sixty years. Two of the principal were within the twelve miles circle; that is, one at Newcastle and one at the mouth of the Christiana. Besides, the words employed are the appropriate legal terms for making the grant. When the same subject comes up for judgment, the same terms are employed for describing what was granted, as may be seen in Martin *vs.* Waddell, and Munday *vs.* Arnold. The same terms were used, substantially, in patents and grants which conveyed or intended to convey navigable rivers, as in the patent to the duke of York, the grant to Lord Berkeley and Sir George Carteret, and from them to the proprietaries of New

Jersey. This is still another test. If the object was to grant the river, islands, and soil, could any lawyer or conveyancer have devised, or can any one now devise, a better or even as good a form of words to accomplish it? Strike them out, and all the other purposes of the deeds, it is true, are effectuated without them. They are thus rendered surplusage. This would be an offence against another established rule of construction, which requires that all the words of an instrument should, if practicable, be allowed to have some sense and operation. But while these words stand, it seems to be impossible that now, after more than a century and a half, any one, and particularly any third person, and, above all, a third person without right, power or interest in the subject matter of the grant at the time it was made, and for nearly a century after, can claim to have them stricken out or disregarded.

The intimation by Judge Baldwin, in his charge, that the two grants are to be so construed together as that one may control the other, so as to give them the same eastern boundary, with all respect for his learning and ability, cannot be admitted. In a legal estimate, they are not one deed, because they are two deeds; and they are not the same, because they are different. Why were they two, and why should they differ? The grantor so willed it, and he did as he willed, and as he had a right to do, in language evidently framed by learned advisers. They can well stand together, for there is no contradiction between them. If a man were to give estate A. in fee simple, estate B. in fee tail, and estate C. for life or years, it would seem extraordinary to say that he gave the same estate in all.

Nor is the difficulty overcome when the first step is taken. Admit (if it be possible) that the deeds are thus to be construed, which of them is to have the controlling power, the one that carries the boundary over to the low-water mark, on the Jersey shore, or the one that stops at the low-water mark on the Delaware side. It is apprehended that there is no legal principle to aid in deciding that question, and that in the apparent search for reasons, we should find ourselves in the region of fancy and imagination. Of what consequence can it be what were the reasons of the king and the duke of York, or whether they had any reasons at all. Their will decided them to give what was their own, and they had a right to give. If they were not deceived in the grant, (as certainly there is no reason to believe they were,) it is wholly immaterial whether the act commended itself to other men's reason or not—whether it was wise or unwise. Neither of them has had much credit with posterity for wisdom. But this act has never been imputed to them as a crime or folly. In the most sober judgment, it must rather be deemed reasonable and meritorious. The three lower counties, at Newcastle, had a width on the land of but twelve miles, being cut off to the westward by the line between them and Lord Baltimore. They had no great navigable rivers. That line, probably running upon the summit between the Delaware and Chesapeake, where the heads of the streams were turned in opposite directions, probably left them no water communication with that great estuary and its

tributaries. Their neighbors, New Jersey, Pennsylvania, and Maryland, all with extensive territories on the land, abounded also in great navigable rivers within their limits. Was it then, it may be inquired, so unreasonable to allot them as a part of their possession a little addition to their width, by giving them a part of the river, reserving only the public rights (navigation for instance) which were free and common to every subject, and now are to every citizen of the United States? Was it so unreasonable as of itself to condemn the grant, and compel a construction against the clear words to secure its condemnation? From the circle downwards, the breadth of the land increased, and did not so much demand enlargement. Besides, at the southern point where the circle strikes the water, the river begins to widen rapidly and becomes the bay, which there might be good reasons for not granting. There is nothing which seems at all unreasonable in the grant. It was made to freemen, capable of holding and enjoying it, of transmitting it to their descendants, who, in due time, asserted and maintained their right to independence, and in the conflict which ensued, and in all the duties of its more intimate union with the other States under the constitution, Delaware has contributed its full proportion of what was required for the public welfare and honor. So has New Jersey. In this respect they are equal. But who can say that it was more unreasonable or less conducive to the well being and happiness of our country, or of mankind, that it should have fallen to the lot of Delaware rather than of New Jersey, or been left to be equally divided between them.

But this can hardly be called legal argument. There is too much in it that is apart from the real question. What is the construction of the grant? Is it in any respect wrongful? These are the true questions. Both are believed to be with the State of Delaware.

Returning to the point digressed from, when the question of construction of the deeds was taken up, it is only necessary to observe that the colony of the three lower counties having been received into the Congress, became in due time a State. This was a great change. But, great as it was, it was the whole change. No one ever thought that by becoming a State, the territorial rights and possessions previously belonging to it, were reduced or altered. Where was there a power to do either? Not, surely, in any other State. As surely, not in the Congress of the United States; and these two descriptions embrace the whole circle of acknowledged authority. When the charters of some of the States were found to include large masses of vacant land, which might be dangerous to the peace of the Union, did Congress, or either or all of the States, attempt to define or limit their boundaries? Congress invited them to make cessions, which they freely and patriotically did, by compact, and with the conditions they thought fit to insist upon and Congress to accept. The declaration of independence, from the day it was made, is thenceforth the title of every State.

What remains, then, to be considered, may be embraced in this general inquiry: Has the State of Delaware, by any act or default

of her own, parted with or lost the right she then had, or any part of it?

The examination of this question must, however, be preceded by an observation no one will refuse his assent to, which, nevertheless, when fairly carried out, will be found to meet and conclusively to answer most, if not all, the objections alleged to the title of the United States, derived from the State of Delaware. It is this: that the inquiry is to be understood as applied to a sovereign State, with all the attributes of sovereignty, except such as have been yielded to the United States. Whoever would claim from her, or would claim against her, must, therefore, make out such a case as will be available against a sovereign. More clearly must it be so, if the claim be to take from her a portion of her territory, and a part of her boundaries; not to come in under her and be one of her community, but to transfer them to an alien jurisdiction; in other words, to make them part and parcel of another State. Such is the claim made by Mr. Humphrey. The right he asserts is not under the State of Delaware, but adverse to her.

As long as the discussion was upon the boundaries of the respective States, every argument which conduces to show the right to be in one rather than the other, is fairly applicable and entitled to respectful attention, which they have accordingly received. But the moment that point is settled, and the boundaries established, all within the line on the respective sides is part of the territory of the one it is adjudged to, and is subject to her exclusive sovereign jurisdiction. To her alone belongs the rightful power to govern and make laws for it, without interference by the United States, or by any State. That there was a dispute about boundaries, was a good reason for settling it; but none for holding it less the territory of the State after the dispute is settled, than any other part of her possessions. No one, for example, would affirm that what fell into Maryland or Delaware by fixing the line between them, or between Pennsylvania and Maryland, or between Pennsylvania and Virginia, is less within their jurisdiction than any other portion of the territories of these States. Wherever their limits are, up to that line, their law making power extends and governs. This principle, believed to be undeniable, applies in full force to the present case. If it has been necessary, for the purpose of deciding the controversy about the Pea Patch, to determine, incidentally, the question of the boundaries of the two States at that part of the river, (and it has been so argued on both sides,) and it has been determined that the island is within the territory of Delaware, it must follow that the island is also within her sovereignty; and whoever puts his foot upon it, is subject to her laws just as much as if he resided in Newcastle or in Wilmington. Whoever would seek to recover it at law, must go into her courts, including in that description the circuit court of the United States, where there are proper parties; a court established for administering the laws of the State, in civil cases, where one of the parties is an alien, &c., of another State, or otherwise entitled to the aid of an United States tribunal; but still to administer those laws. In re-

gard to the Pea Patch, there has been a conflict of jurisdiction. Dr. Gale brought an ejectment in the circuit court of the United States for the district of New Jersey, recovered a judgment, and obtained an execution. The United States brought an ejectment, in the district of Delaware, got a judgment, issued an execution, and the marshal of Delaware was authorized to turn out those whom the marshal of New Jersey had been authorized to put in. Records of both were produced. Both were necessarily disregarded as affecting the question now under consideration. The only thing certain about them was, that both could not have jurisdiction; and which of them had, depended upon exactly the same point as the present case turns upon, namely: whether the island was in New Jersey or Delaware. And it may also be remarked, that in one of them (Delaware) the judgment was by default; in the other, it was upon a trial essentially ex parte, with a very imperfect exhibition of evidence, by no means to be compared with what has been produced in this arbitration.

Considering it to be established that the island is within the limits of Delaware, Mr. Humphrey is to make out a title to it in one of two ways: by showing that he has himself acquired it, in which case he must show that his acquisition of it has been under or according to the laws of Delaware; or that New Jersey has acquired it, and that her title enures to his use.

As to the first, nothing has been alleged but possession. By the laws of Delaware, possession does not avail against the State. The statute of limitation, between individuals, is truly said to be a law of peace. An exception to it, in favor of States, or a considerable extension of time in their behalf, may be as truly said to be a law of necessity; for States cannot occupy, as individuals, so as to have an actual manifest possession, which is notice; nor can they apply the same vigilance which is reasonably required of private proprietors. It is not neeessary to dwell on this. Actual possession there has not been. His honor, the late Judge Baldwin, says, that by the survey of 1784, and its acceptance by the proprietaries, the Messrs. Hall, and Dr. Gale under them, stood in the place of the west New Jersey proprietaries, with all their rights. "His legal seizin or possession," continued for 31 years, till 1815, would bar the right of entry of any adverse claimant. Had the right been in the proprietaries, and the island within New Jersey, the legal seizin or possession, as before stated, would have accompanied the grant. But neither part of the postulate is correct. The proprietaries had no right, as has been seen, and the island was not within New Jersey. When Dr. Gale, or some one claiming under him, obtained the title of the State, in 1831, he could get no legal seizin, for one of the reasons already stated; and for this additional one, that the United States were then in actual adverse possession.

Thus, then, there was no legal seizin or possession. That there was no actual possession under the survey, worthy to be so called, or to found a right upon, seems to be an unavoidable inference from the evidence. The survey could not have been made on the ground. Its date, 1784, is near the time when the island was about

the size of "a man's hat," and overflowed every high tide. There was no resting place upon it for the surveyor's foot or his instrument. But there is something else, much more conclusive. The surveyor returns the contents to be 178 acres. More than fifty years afterwards, when the island had been growing all the time, it contained by accurate measurement, only 87.60 acres. The surveyor, therefore, did not begin a possession, though he made a sufficient survey if the proprietaries accepted it, as they certainly did. No survey, indeed, was necessary, for an island is sufficiently defined by the waters. The only other evidence of possession is, that in the spring of 1813, April or May, Doctor Gale took down a large party of men. The witness who proved it was one of the company. He said they went there to fish, and it was stated that Doctor Gale had in view to clear a fishery, but it did not answer, on account of the strength and direction of the currents, which swept the nets into deep water and let the fish escape. They found upon the island a rough frame house, recently erected, (probably by Doctor Gale,) of one story in height, with one room in it, and no chimney or fire-place. They used, for cooking, a stove they carried down in a boat, and brought away with them. They left the island in August, and, as far as appears, never returned. What became of the house is not in proof. The occurrence just related was after the military officers of the United States had fixed their attention upon the spot as a site for a defence of the river. About the same time, General Bloomfield, who was in command of the military district, went to Delaware to negociate a cession of the island to the United States, being himself a citizen of New Jersey, and having been her governor and ex-officio chancellor, and, it is reasonable to suppose, acquainted with her rights. In December, 1814, Captain Clarke, of the United States topographical engineers, under orders from the War Department, taking with him one hundred soldiers and some thirty or forty workmen, and the frame of a block house, went upon the island to commence the work of a fortification, and remained there till June, 1816. He states that there was nobody on the island when he went there, nor any building or "vestige" of one, and that nobody was there during his stay but those under his command. From the survey, then, 'till 1816, there was no possession, and from that time the United States have been in possession. The fishing visit of 1813 cannot be called a possession, and if connected with Doctor Gale's claim of title, it might be so termed for the time, still it was abandoned, leaving no mark of ownership. There was no actual possession, therefore, even if that could have been available. The evidence is that the island was occupied only by crows, selected by them as a lodging place for its solitude and security.

Has the State of New Jersey acquired any right under which his claim could be covered? If a case were established, in point of fact, it would be necessary to inquire how such a right could be acquired by New Jersey, the territory in question being within the State of Delaware, and subject to her laws and government. But it does not seem requisite to enter upon that inquiry, inasmuch as

the proofs are deemed to have made out no such case. The controversy, it will be seen, embraces two descriptions of rights, namely, the river and the soil under it, and islands in the river. The former is not susceptible of actual possession—the latter are. To begin with the latter. The evidence is, that within the twelve miles circle, before the Pea Patch made its appearance, there were only two islands, (so called,) Reedy island and Bombay Hook. They have both been in the possession and under the jurisdiction of Delaware. Bombay Hook, it is believed, cannot with propriety be called an island in the river. It lies within the line of the main land of Delaware, above the low water mark of the river, and has been surrounded by water only by reason of an artificial outlet being cut for Duck creek into the bay. There remains, then, only Reedy island. It may be said that it lies nearest to the Delaware shore. But it was in the river, and if the right to the river and islands was in the crown, while Delaware was a province, Delaware could have had no right in Reedy island, whether it was on one side or the other of the channel. Her possession, as of right, is thus a strong proof that her title was prior to that which would have accrued to her by the devestiture of the right of the crown, and the leaving of the river vacant between two States. New Jersey had no island within the twelve miles circle.

A passage in Smith's History of New Jersey, it was thought, disclosed some right of New Jersey to an island there called Stuypson's island. The author, in giving an account of a negotiation with the Indians, says: "Also Stuypson's island, near Delaware river. Tom Store claims thirty acres," &c. The island was not found upon the map during the investigation, being searched for in the river, though Smith's language, "near Delaware river," indicated that the distance was not from the land into the river, but from the river into the land. A close examination since has shown that it is what may be called an "inland island," formed by small streams, with, perhaps, the river on one side, but above the low water mark, and within the outline of the land, as "Bombay Hook," is on the other. It is far below the twelve miles circle, and is undoubtedly a part of New Jersey, by her original right; but not an island in the river or bay.

Something was also said about Egg island, but no evidence given. From the map, it appears to be a very small island, low down in the bay, out of the circle, lying near to the main land of New Jersey. Whether it is separated from the main, or adjoins it, by whom it is held, if by any body, and under what tenure, there is no proof in the case. New Jersey, or those claiming under her, had no island within the twelve miles.

As to the Pea Patch island, New Jersey had at no time possession, and cannot be said to have set up a right to it. The contrary is quite clear. The right asserted was that of the west New Jersey proprietaries, which, as has been seen, was adverse to the State, and could not in any way enure to her use. So of the right of Doctor Gale and those deriving from him. And when, at last, it came to be doubted whether the proprietaries had any right at

all, and when the United States were in actual possession, and New Jersey was asked for an act, that act did not assert any title, but only released her right and interest, whatever it might be. Delaware, on the other hand, was in possession, as far as a State could be. There is satisfactory evidence as to one individual residing on the island after the United States entered upon it; that he was assessed and voted in Red Lion hundred.

So much for the islands. Now as to the jurisdiction. There is no evidence to establish a single instance of its exercise by New Jersey over that part of the river and islands, and there is no reason to believe that there was one. One witness was called, to show that process from New Jersey had been once served upon the Pea Patch island, in recent times; but it failed entirely. There was no process; there was no arrest, and all that was made out was that a constable from Salem county came with a pistol, and went away without a prisoner. The ejectment in the circuit court of the United States for the New Jersey district, is of no weight. It was brought by an individual, of his own authority; it was after this controversy had begun, and for the purpose of determining this controversy.

On the part of Delaware, the evidence is full and complete of the exercise of jurisdiction over that part of the river and islands, as far back as evidence can be expected to go. The process of her courts, and of the courts of the United States sitting in that district, for the arrest of persons and property afloat, has been issued and executed, and continues so to be, quite over to the low water mark on the Jersey side; and this, not occasionally, but habitually, without doubt or question, as a matter of course, whenever applied for. Such arrests have been made of persons and property escaping from above. The cases have been contested upon every ground that ingenuity could suggest, or the zeal of parties prompt; but there never has been an instance of any one disputing the jurisdiction in the courts, either of the State or of the Union. This must be admitted to be very persuasive evidence. In the absence of proof to the contrary, it must be deemed conclusive.

Now, this evidence comes from numerous witnesses, of great intelligence and unquestionable credit, well informed upon the subject they speak of, by their pursuits in life, and it coincides (for it did not require support or corroboration) with the proof of particular instances, both by parol and by exemplifications of records, here produced. The exhibition of the evidence at large, or even a considerable part of it, would be tedious and unnecessary. The whole was carefully reduced to writing, and will be preserved. But it is quite impossible to look at the list of witnesses without feeing unbounded confidence that, from their own experience, and from the traditions and other sources of information of the past, which lawyers and judges are obliged to explore, and to follow as their guide, we have the whole knowledge of what has been held and done from an early, perhaps the earliest, period, concentrated and condensed in this body of testimony. With nothing to contradict it, (and there is nothing,) one might safely say, such has

always been the law of Delaware. Kensey Johns, esquire, for example, above eighty-eight years of age, states "that he has resided in Newcastle since 1780, now sixty-seven years. He was a practising lawyer for twelve years, afterwards chief justice of the supreme court for thirty-eight years, afterwards chancellor of the State, since that time, and at present, living a private gentleman." Any one else, speaking of him, would add, and, during the whole of this lengthened period, exercising a most wholesome influence, by example and precept, upon the mind and morals of the community he lived in. He says "it has always been considered and held by the courts, public officers and lawyers of Delaware, as far as my memory reaches, that the title and jurisdiction of the State of Delaware extended to a circle of twelve miles around Newcastle, to low water mark on the New Jersey shore. I have never heard the title and jurisdiction of the State of Delaware, over that part of the river Delaware, doubted by any court, public officer or lawyer in Delaware, on any occasion whatever. Within my knowledge and remembrance, writs have been often issued out of the courts of Delaware, to seize vessels and persons in all parts of the river Delaware, within the circle to low water mark on the New Jersey shore, and no dispute, question, or plea was ever made or suggested, within my memory, before any court in Delaware, against the title of Delaware over all such parts." And, again, "the State of Delaware, for the whole period of my remembrance, and as far back as my researches extend, has claimed and exercised jurisdiction over the Delaware river and soil thereof, within the circle, to low water mark on the Jersey shore, and the State has never failed to exercise this jurisdiction when called upon or asked to do so." Eleven other witnesses, eminent citizens of Delaware, with large means of knowledge, whose names, if repeated, would command respect for their testimony, make similar statements, and some of them give an account of particular cases of arrest and seizure, known to them personally. John Steele, also, a citizen of Pennsylvania, gives an account of his following a vessel down the river, getting process against her from a court in Delaware, and having it executed far over on the east side of the river.

New Jersey, as before stated, never objected to the claim of Delaware, nor, as far as appears, set up any claim of her own. In 1709, the boundaries of counties were fixed by an act of the legislature. Those on the Delaware were bounded on the west by the river, the lines running along the river shore, and not into the river. In 1822, it is true, an act was passed to extend one or more of the lower counties into the river. But this was after the United States had obtained the cession from Delaware, was in actual possession, and this controversy had begun. Besides, of what avail is such an act of the legislature, except as some evidence (under the circumstances just mentioned very feeble, indeed) of a belief of right, and keeping up of a claim over her own territory; a constitutional act of a State legislature, touching any part of the territory, is undoubtedly potent, and is notice to all the world. But as to

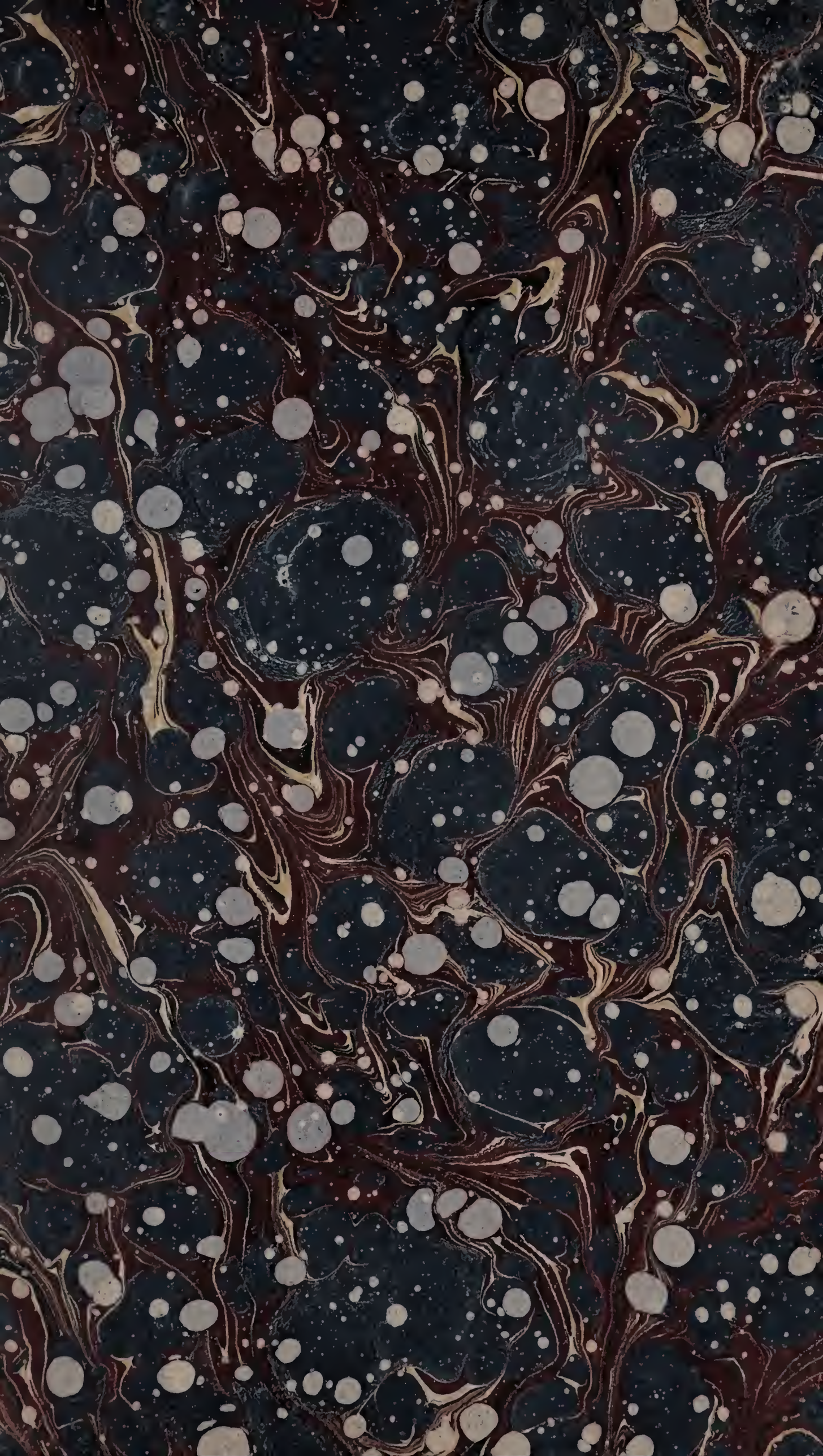
territory of another State, it is inoperative, and it is notice to nobody. This act, therefore, is of no effect.

Upon all the grounds thus reviewed, the conclusion is, that the title to the Pea Patch island was in the State of Delaware. On the 27th May, 1813, that State, by an act of her legislature, ceded it to the United States upon conditions having regard to the public benefit, and not for any selfish interest of her own. No doubt can be entertained that New Jersey would, in the like case, have done as her sister Delaware did, had she been free to do so. But a private claim had intervened, which she had no rightful power to dispose of; and, if it has so happened that, after a long and costly litigation, that claim has proved to be unfounded, it is to be regretted that the claimant should have been put to useless expense and trouble; but this feeling can have no influence in determining the question of right.

By the cession of Delaware the title passed to the United States. The award, therefore, must be, and is, that the title is in the United States.

JOHN SERGEANT.

WASHINGTON, *January* 15, 1848.



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